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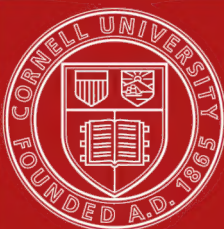
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The principles of equity, intended for th



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THE  
PRINCIPLES OF EQUITY,

INTENDED FOR

THE USE OF STUDENTS AND THE PROFESSION.

BY

EDMUND H. T. SNELL,  
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

FIRST AMERICAN EDITION FROM THE SIXTH ENGLISH EDITION.

BY

JOHN D. LAWSON,  
Author of "A Treatise on the Contracts of Carriers," etc.

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BY WILLIAM H. STEVENSON.

## PREFACE TO THE ENGLISH EDITION.

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THE Author, in the course of his studies for the Bar, made so many notes on the Principles of Equity, and the cases in support of them, not only from his own private reading, but from the Lectures of that able and distinguished master, Mr. Birkbeck, the Lecturer on Equity Jurisprudence, that it required but little trouble to recast and mould them into the form of a book. Venturing to think that the work may prove useful, not only to the student but the practitioner, he ventures with diffidence to submit the result of his labors to the consideration of the profession.

[The editor of the first American edition has altered the text of the English author so as to adapt it to the changes in the American law. To this end he has cited American authorities whenever necessary. The object of this handbook, being to present that important subject—The Principles of Equity Jurisprudence—in as concise a manner as possible, such of the American adjudications as are necessary to be cited in order to present the American law are given. But the book has not been burdened with all the American cases, as such a course would have extended it far beyond the limits of one volume, besides losing sight of the main object of its publication.]





# CONTENTS.

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## PART I.

### INTRODUCTORY.

CHAP.	PAGES
I. THE JURISDICTION IN EQUITY, . . . . .	1-14
II. THE MAXIMS OF EQUITY, . . . . .	15-48

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## PART II.

### THE EXCLUSIVE JURISDICTION.

I. TRUSTS GENERALLY, . . . . .	49-60
II. EXPRESS PRIVATE TRUSTS, . . . . .	61-108
III. EXPRESS PUBLIC [OR CHARITABLE] TRUSTS, . . . . .	109-115
IV. IMPLIED AND RESULTING TRUSTS, . . . . .	116-126
V. CONSTRUCTIVE TRUSTS, . . . . .	127-137
VI. TRUSTEES AND OTHERS IN A FIDUCIARY RELATION, . . . . .	138-157
VII. DONATIONES MORTIS CAUSA, . . . . .	158-164
VIII. LEGACIES, . . . . .	165-168
IX. CONVERSION, . . . . .	169-189
X. RECONVERSION, . . . . .	190-200
XI. ELECTION, . . . . .	201-220
XII. PERFORMANCE, . . . . .	221-229
XIII. SATISFACTION, . . . . .	230-249
XIV. ADMINISTRATION OF ASSETS, . . . . .	250-264
XV. MARSHALLING OF ASSETS, . . . . .	265-276
XVI. MORTGAGES, LEGAL, . . . . .	276-295
XVII. MORTGAGES, EQUITABLE, . . . . .	296-300
XVIII. MORTGAGES AND PLEDGES OF PERSONALTY, . . . . .	301-303

CHAP.	PAGES.
XIX. LIENS, . . . . .	304-308
XX. PENALTIES AND FORFEITURES, . . . . .	309-315
XXI. MARRIED WOMEN, . . . . .	316-345
SECTION I.—SEPARATE ESTATE, . . . . .	317-338
SECTION II.—PIN-MONEY AND PARAPHERNALIA, . . . .	339-340
SECTION III.—EQUITY TO A SETTLEMENT AND RIGHT OF SURVIVORSHIP, . . . . .	340-342
SECTION IV.—SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS, . . . . .	342-345
XXII. INFANTS, . . . . .	346-350
XXIII. LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND,	351-353

## PART III.

### THE CONCURRENT JURISDICTION.

I. ACCIDENT, . . . . .	356-366
II. MISTAKE, . . . . .	367-381
III. ACTUAL FRAUD, . . . . .	382-397
IV. CONSTRUCTIVE FRAUD, . . . . .	398-414
V. SURETYSHIP, . . . . .	415-426
VI. PARTNERSHIP, . . . . .	427-436
VII. ACCOUNT, . . . . .	437-442
VIII. SET-OFF AND APPROPRIATION OF PAYMENTS, . . .	443-461
IX. SPECIFIC PERFORMANCE, . . . . .	462-480
X. INJUNCTION, . . . . .	481-503
XI. PARTITION, . . . . .	504-505
XII. INTERPLEADER. . . . .	505-506

## PART IV.

### THE AUXILIARY JURISDICTION.

I. DISCOVERY, . . . . .	507-509
II. BILLS TO PERPETUATE TESTIMONY, . . . . .	510-515
III. BILLS "QUIA TIMET" AND BILLS OF PEACE, . . . .	510-515
IV. CANCELLING AND DELIVERY UP OF DOCUMENTS, . . .	516-521
V. BILLS TO ESTABLISH WILLS, . . . . .	522-524
VI. "NE EXEAT REGNO," (REIPUBLICÆ) . . . . .	525-526

## TABLE OF CASES CITED.

### A.

ABB TT, *Ex parte*, 321.  
 ——— *v. Swarder*, 390, 392.  
 Abernethy *v. Hutchinson*, 500.  
 Abraham *v. Bubb*, 495.  
 Ackerman *v. Emott*, 152.  
 Ackreyd *v. Smithson*, 180, 182, 184,  
 185.  
 Adamson, *Ex parte*, 435.  
 Adams *v. Angell*, 291.  
 Adderly *v. Dixon*, 455, 457, 459.  
 Addlington *v. Cunn*, 104.  
 Adney *v. Field*, 363.  
 Adsit *v. Adsit*, 212.  
 Agar-Ellis, *In re*, 347.  
 Ainslie *v. Medicott*, 374.  
 Alderson *v. White*, 279.  
 Aldrich *v. Cooper*, 266.  
 Aldridge *v. Wallscourt*, 259.  
 Aleyn *v. Belchier*, 413.  
 Allan *v. Knight*, 25, 38.  
 Allen *v. McPherson*, 380.  
 Allen *v. Seckham*, 370.  
 Allison's Case, 387.  
 Almy *v. Reed*, 358.  
 Alston *v. Munford*, 266.  
 Amphlett *v. Parke*, 188.  
 Anderson *v. Anderson*, 431.  
 ——— *v. Elsworth*, 412.  
 ——— *v. Lemon*, 134.  
 ——— *v. Radcliffe*, 97.  
 Andrews *v. Salt*, 347.  
 Angell *v. Angell*, 508, 510, 512.  
 Anglo-Italian Bank *v. Davies*, 284.  
 Antrobus *v. Davidson*, 420.  
 ——— *v. Smith*, 72.  
 Apple *v. Allen*, 335.  
 Appleton *v. Rowley*, 323.  
 Arbuthnot *v. Norton*, 96.  
 Armitage, *In re*, 425.  
 Armstrong *v. Gilchrist*, 440.  
 Arnot *v. Biscoe*, 389.  
 Arrowsmith, *Ex parte*, 276.  
 Arthur *v. Franklin*, 284.  
 Arundell *v. Philpot*, 361.  
 Ashburner *v. MacGuire*, 168.  
 Ashburnham *v. Ashburnham*, 217.  
 Ashby *v. Palmer*, 178, 193.  
 Ashley *v. Ashley*, 252.  
 Ashworth *v. Outram*, 318.  
 Astley *v. Weldon*, 311, 313.  
 Astor *v. Wells*, 38.  
 Athenæum Life Association *v. Pooley*,  
 95.  
 Atkinson *v. Leonard*, 357.  
 ——— *v. Smith*, 295.  
 Atkins *v. Kinnier*, 312.

Atty. Gen. *v. Biphosphated Guano Com-*  
*pany*, 34.  
 ——— *v. Caius College*, 113.  
 ——— *v. Christ's Hospital*, 114.  
 ——— *v. Cleaver*, 496.  
 ——— *v. Downing*, 140.  
 ——— *v. Duke of Marlborough*, 495.  
 ——— *v. Gleg*, 140.  
 ——— *v. Herrick*, 112.  
 ——— *v. Marchant*, 113.  
 ——— *v. Mayor of Bristol*, 113.  
 ——— *v. Lord Mountmorris*, 275.  
 ——— *v. Nichol*, 497.  
 ——— *v. Ray*, 384, 387.  
 ——— *v. Sibthorp*, 362.  
 ——— *v. Sitwell*, 409, 460.  
 ——— *v. Southmolton*, 113.  
 ——— *v. The Ironmongers' Company*,  
 111.  
 ——— *v. Tonna*, 112.  
 ——— *v. Trinity College, Cambridge*,  
 113.  
 Atty. Gen. of Jamaica *v. Manderson*,  
 449.  
 Atwood *v. Chichester*, 331.  
 Atwood *v. Maude*, 436.  
 Austin, *In re*, 97.  
 Averall *v. Wade*, 268.  
 Ayerst *v. Jenkins*, 519.  
 Ayles *v. Cox*, 475.  
 Aylesford *v. Morris*, 409.  
 Aylesford's Case, 463.  
 Aylet *v. Dodd*, 311.  
 Aylett *v. Ashton*, 332.  
 Ayliffe *v. Murray*, 144.

### B.

Baby *v. Miller*, 236.  
 Backhouse *v. Charlton*, 297, 429.  
 Baddeley *v. Baddeley*, 75, 319.  
 Badger *v. Badger*, 43.  
 Baggett *v. Meux*, 357.  
 Bagnall *v. Carlton*, 145.  
 Bailey *v. Edwards*, 423, 425.  
 ——— *v. Finch*, 447.  
 ——— *v. Sweeting*, 87, 466.  
 Bain *v. Sadler*, 252.  
 Baker *v. Bradley*, 337, 402.  
 Baldwin *v. Campfield*, 118.  
 Bales *v. Dandy*, 317.  
 ——— *v. Storie*, 470.  
 Balls *v. Strutt*, 140.  
 Balmano *v. Lumley*, 477.  
 Bamford *v. Creasy*, 314.  
 Bankhead *v. Alloway*, 441.  
 Bank *v. Roosevelt*, 284.  
 Bannister, *In re*, 479.  
 Bardswell *v. Bardswell*, 100.

- Baring *v.* Noble, 435.  
 Barker *v.* Cox, 477.  
 — *v.* Goodaire, 429.  
 — *v.* Hill, 362.  
 Barkworth *v.* Young, 466, 467.  
 Barnes *v.* Raxter, 268.  
 Barnett *v.* Sheffield, 95.  
 Barnewell *v.* Lord Cawdor, 260.  
 Barnhart *v.* Greenshields, 279, 35.  
 Barrack *v.* McCulloch, 324, 337.  
 Barrel *v.* Sabine, 280.  
 Barrett *v.* Blagrove, 489.  
 — *v.* Beckford, 233.  
 Barrow *v.* Barrow, 320, 377.  
 Barrs *v.* Fewkes, 188.  
 Barry *v.* Croskey, 354.  
 Bartlett *v.* Gillard, 234.  
 — *v.* Pickersgill, 117.  
 Bascomb *v.* Beckwith, 469.  
 Baskett *v.* Hassell, 158.  
 Basset *v.* Nosworthy, 28.  
 Bastard *v.* Proby, 69.  
 Batard *v.* Hawes, 421, 422.  
 Bate *v.* Hooper, 153.  
 — *v.* Eley, 110.  
 Bath, Earl of, *v.* Sherwin, 514.  
 Baumann *v.* James, 454.  
 Baxter *v.* Conolly, 454.  
 — *v.* West, 433, 432.  
 Bayspool *v.* Collins, 87.  
 Beach *v.* Cook, 284.  
 Beale *v.* Symonds, 124.  
 Beall *v.* Smith, 351.  
 Beauclerk *v.* Mead, 171.  
 Beavan *v.* Lord Oxford, 85.  
 Becke *v.* Kantorowicz, 407.  
 Beckervaise *v.* Lewis, 95.  
 Beckett *v.* Buckley, 284.  
 Beckford *v.* Beckford, 119.  
 — *v.* Wade, 285.  
 Beeston *v.* Stutley, 477.  
 Beever *v.* Luck, 285.  
 Belchier, *Ex parte*, 142.  
 Belfour *v.* Weston, 365.  
 Bell *v.* Barnett, 134.  
 Benbow *v.* Townsend, 59.  
 Bennett *v.* Cooper, 91.  
 Bennett *v.* Bennett, 120.  
 — *v.* Houldsworth, 245.  
 Benson *v.* Benson, 191.  
 — *v.* Lamb, 479.  
 — *v.* Whittam, 102.  
 Bentley *v.* Craven, 407.  
 — *v.* Mackay, 372.  
 Benwell *v.* Inns, 400.  
 Benyon *v.* Benyon, 236.  
 Beresford *v.* Drivers, 458.  
 Bernard *v.* Minshull, 99, 104.  
 Berry *v.* Cross, 431.  
 Berwick, Mayor of, *v.* Murray, 421.  
 Besant, *In re*, 349.  
 Besley *v.* Besley, 476.  
 Best *v.* Hill, 445.  
 Bethell *v.* Abraham, 243.  
 Betts *v.* Kimpton, 316.  
 Beverley *v.* Atty.-Gen., 113.  
 Bigelow *v.* Wilson, 284.  
 Biggs *v.* Terry, 349.  
 Bigland *v.* Huddleston, 217.  
 Bill *v.* Cureton, 76, 85, 516.  
 Bindley *v.* Patridge, 143.  
 Birch *v.* Ellames, 38.  
 Birmingham Canal Company *v.* Cartwright, 279.  
 Birmingham *v.* Kirwan, 213.  
 Biscoe *v.* Earl of Banbury, 37.  
 — *v.* Breckels, 432.  
 Blackburn *v.* Stables, 64.  
 Blacket *v.* Lamb, 207, 209.  
 Blagden *v.* Bradbear, 461.  
 Blagrove *v.* Routh, 157.  
 Blaiklock *v.* Grindle, 211.  
 Blain *v.* Terryberry, 326.  
 Blake *v.* Langdon, 443.  
 Blakely Ordinance Company, 96.  
 Blakely *v.* Brady, 75.  
 Blanchet *v.* Foster, 344.  
 Bland *v.* Mayo, 187.  
 Blandy *v.* Widmore, 226, 227, 229, 234.  
 Blann *v.* Bell, 274.  
 Bligh, *In re*, 357.  
 Blissit *v.* Daniel, 430.  
 Blundell *v.* Brettargh, 366.  
 Blunden *v.* Desart, 306.  
 Bold *v.* Hutchinson, 377, 467.  
 — *v.* Hopkins, 460, 464.  
 — *In re*, 99.  
 Bone *v.* Pollard, 122.  
 Bonham *v.* Newcombe, 278.  
 Bonner *v.* Bonner, 273.  
 Bonnewell *v.* Jenkins, 480.  
 Bonser *v.* Cox, 423.  
 Booth *v.* Booth, 148.  
 — *v.* Hutchinson, 446.  
 Bootle *v.* Blundell, 256, 523.  
 Bosanquet *v.* Wray, 435.  
 Bostock *v.* Floyer, 141.  
 Boughton *v.* Boughton, 210, 212.  
 Boulbee *v.* Stubbs, 424.  
 Bourne *v.* Bourne, 170, 174.  
 Bouts *v.* Ellis, 164.  
 Bovill *v.* Hammond, 436.  
 Bowser *v.* Colby, 314.  
 Box *v.* Barrett, 380.  
 Boynton *v.* Boynton, 218.  
 — *v.* Parkhurst, 270.  
 Boyse *v.* Rossborough, 397, 523.  
 Bozen *v.* Bolland, 305.  
 Brace *v.* Duchess of Marlborough, 291.  
 Bradford *v.* Romney, 378.  
 — *v.* Union Bank, 473.  
 Bradish *v.* Gee, 195.  
 Bradley *v.* Riches, 34, 40, 285.  
 Braham *v.* Brachim, 503.  
 Brandon *v.* Robinson, 318, 333.  
 Breadalbane *v.* Chandos, 377.  
 Brecknock Canal Company *v.* Pitchard, 365.  
 Brennan *v.* Bolton, 463.  
 Brentwood Brick & Coal Company, *In re*, 130.  
 Bresler *v.* Kent, 331.  
 Brewer *v.* Swirles, 323.  
 Brice *v.* Stokes, 149, 150, 156.  
 Bridge *v.* Bridge, 78.  
 Bridgeman *v.* Green, 387.  
 Briggs *v.* Chamberlain, 195.  
 — *v.* Penny, 102.  
 Brighton Arcade Company *v.* Dowling, 446.  
 Bristow *v.* Warde, 205.  
 British Empire Shipping Co. *v.* Somes, 357, 429.  
 Broadbent *v.* Imperial Gas Company, 497.  
 Broad *v.* Self, 278.  
 Brocchus *v.* Morgan, 155.  
 Broder *v.* Sallard, 489.  
 Bromley *v.* Holland, 520.  
 Brooke *v.* Garrod, 280.  
 — *In re*, 256, 306.  
 — *v.* Brooke, 256.  
 — *v.* Rounthwait, 476, 479.  
 Brooks *v.* Martin, 43.  
 — *v.* Hutt, 369.  
 Brown *v.* Cole, 285.  
 — *v.* De Tastet, 147.  
 — *v.* Higgs, 106, 363.  
 — *v.* Litton, 147.  
 — *v.* Lamphaer, 373.

Brown *Re*, 449.  
 Bruce v. Bruce, 362.  
 Bruere v. Pemberton, 253.  
 Bryant v. Bull, 284.  
 Brydges v. Phillips, 259.  
 Bryson v. Whitehead, 400.  
 Buchanan v. Kerby, 449.  
 Buckland v. Pocknell, 129.  
 Buckle v. Mitchell, 27, 35.  
 Buckton v. Hay, 334.  
 Buggin v. Yates, 100.  
 Bull v. Church, 213.  
 Bull v. Vardy, 361.  
 Buller v. Plunket, 94.  
 Bulley v. Bulley, 506.  
 Bullock v. Dommitt, 365.  
 Bullpin v. Clarke, 328.  
 Bunn v. Markham, 158.  
 Burdick v. Garrick, 438.  
 Burgess v. Burgess, 502.  
 — v. Wheate, 123.  
 Burke v. Greene, 97.  
 Burles v. Popplewell, 486.  
 Burn v. Carvalho, 91.  
 Burrell v. Baskerfield, 171.  
 Burrough v. Philcox, 106.  
 Burrows v. Walls, 156.  
 Burnell v. Fauber, 421.  
 Bute (Marquis) v. Thompson, 365.  
 Butler v. Butler, 155.  
 — v. Freeman, 348.  
 Buttanshaw v. Martin, 336.  
 Butterfield v. Heath, 87.  
 Buttricke v. Brodhurst, 218.  
 Buxton v. Lister, 426, 457.  
 Byrne v. Byrne, 233.  
 Byard v. Holmes, 384.

## C.

Cadigan v. Brown, 513.  
 Calvert, *Ex parte*, 305.  
 — v. London Dock Co., 423.  
 — v. French, 380.  
 Campbell v. Holyland, 294.  
 — v. Mullett, 435.  
 — v. Scott, 499.  
 — v. Walker, 406.  
 — James, *Re* 487.  
 Capel v. Butler, 426.  
 — v. Ellison, 193.  
 — *Ex parte*, 284.  
 Carron Iron Co. v. Maclaren, 484.  
 Carter v. Carter, 154, 25.  
 — v. Palmer, 407.  
 — v. Saunders, 256.  
 — v. Wake, 302.  
 Cartwright v. Pulteney, 505.  
 — v. Richards, 413.  
 Casborne v. Scarfe, 282.  
 Case v. Fishback, 357.  
 Castle v. Warland, 143.  
 Catlin v. Henton, 283.  
 Caton v. Caton, 461, 465, 467.  
 — v. Rideout, 324.  
 Cator v. Pembroke, 131.  
 Catt v. Tourle, 488.  
 Cawdor v. Lewis, 448, 411.  
 Cecil v. Juxon, 319.  
 Chaloner v. Butcher, 195.  
 Chambers v. Goldwin, 278.  
 Champney v. Davey, 115.  
 Chancey's Case, 232.  
 Chapman v. Emery, 85.  
 Charter v. Trevelyan, 407.  
 Chase v. Peck, 297.  
 Chatterton v. Cave, 498.  
 Chattock v. Muller, 480.  
 Cheavin v. Walker, 503.

Cheatham v. Ward, 424.  
 Chesterfield v. Jansen, 383.  
 Chichester v. Bickerstaff, 198.  
 — v. Coventry, 244.  
 — v. Stephens, 256.  
 Childers v. Childers, 118.  
 Chilton v. Brandon, 128.  
 Cholmondeley v. Clinton, 286.  
 Chorley, *Ex parte*, 95.  
 Christie v. Christie, 603.  
 City of London v. Levy, 508.  
 Clark v. Ganfield, 152.  
 Clark v. Sewell, 233.  
 — v. Taylor, 112.  
 — v. Wright, 89.  
 — v. Cort, 445.  
 — v. Franklin, 172, 179, 188, 189.  
 — v. Girdwood, 403.  
 Clark v. Henshaw, 258.  
 — v. Parker, 393.  
 — v. Royle, 128.  
 Clarkson v. Kitson, 395.  
 Clayton's Case, 448, 451, 450.  
 Clayton v. Earl of Winton, 89.  
 Clegg v. Fishwick, 134.  
 Cleland, *Ex parte*, 307.  
 Clements v. Hall, 433.  
 Clementson v. Gandy, 216.  
 Clermont v. Tasburgh, 476.  
 Cleveland v. Gas Co., 497.  
 Clifford v. Burlington, 362.  
 Clifton v. Burt, 261, 262.  
 — v. Cockburn, 372.  
 Clinan v. Cooke, 465, 470.  
 Clive v. Carew, 323.  
 Clough v. Bond, 142, 143-152, 364.  
 Cochran v. Willis, 370, 373.  
 Cockell v. Taylor, 97.  
 Cocks v. Chandler, 503.  
 — v. Manners, 111.  
 Cogan v. Stephens, 184.  
 Cole v. Gibson, 399.  
 — v. Hawes, 99.  
 — v. Willard, 232-246.  
 Coleman v. Mellersh, 157.  
 Coles v. Trecothick, 54, 406.  
 Collett v. Dickenson, 330.  
 Collie, *In re*, 435.  
 Collingwood v. Rowe, 176.  
 — v. Collins, 128.  
 — v. Lewis, 262.  
 Collis v. Robins, 259-261.  
 Colombine v. Penhall, 88.  
 Coming, *Ex parte*, 296.  
 Cook v. Dawson, 256.  
 — v. Dealey, 182.  
 — *Ex parte*, 442.  
 — v. Lamotte, 412.  
 Cookson v. Cookson, 192-197-279.  
 Cookson v. Toole, 331.  
 Coombe, *Ex parte*, 298.  
 Com. v. Sheeby, 260.  
 Coope v. Twynnam, 421, 422.  
 Cooper v. Cooper, 241.  
 — v. Joel, 516.  
 — v. M'Donald, 323, 337.  
 — v. Phipps, 368, 369.  
 Coote v. Boyd, 236.  
 Cooth v. Jackson, 461.  
 Cope v. Evans, 503.  
 Coppin v. Ferneyhough, 135.  
 Corder v. Morgan, 293.  
 Corning v. Lowene, 496.  
 Coutant v. Schuyler, 164.  
 Countts v. Acworth, 413, 516.  
 Coventry v. Chichester, 237.  
 Cowell v. Edwards, 421.  
 Cowles v. Whitman, 459.  
 Crabtree v. Bramble, 196.  
 Cracknall v. Janson, 85, 291.

Craddock v. Piper, 267.  
 Cranmer's Case, 231.  
 Crawford v. Shuttock, 503.  
 Crawshaw v. Collins, 433, 429.  
 — v. Maule, 429, 428.  
 — v. Thornton, 506.  
 Craythorne v. Swinburne, 420, 422.  
 Croft v. Goldsmid, 314.  
 — v. Lindsey, 485.  
 Crompton's Trusts, *In re*, 337.  
 Crosse v. Smith, 485.  
 Crossley v. City of Glasgow Life Assurance Company, 442.  
 Crouch v. Credit Foncier of England, 96.  
 — v. Clay, 360.  
 Crowle v. Russell, 486.  
 Cruse v. Barley, 188.  
 Cullen v. Atty.-Gen., 105.  
 Currant v. Jago, 119.  
 Currie, *In re*, 351.  
 Currie v. Pye, 236, 274.  
 Curry v. Pile, 235.  
 Curteis v. Wormald, 186.  
 Curtis v. Rippon, 100.

## D.

DA COSTA v. Scandret, 390.  
 Daking v. Whimper, 85.  
 Dale v. Sollett, 444.  
 — v. Cook, 443.  
 Dally v. Wotham, 407.  
 — on v. Coatsworth, 359.  
 Damer v. Lord Portarlington, 289.  
 Daniel v. Mitchell, 385.  
 Daniels v. Davidson, 154.  
 Darby v. Darby, 434.  
 Darbey v. Whittaker, 454.  
 Darde v. Martyn, 142.  
 Darkin v. Darkin, 324.  
 D'Arras v. Keyser, 174.  
 Dashwood v. Bulkely, 397.  
 — v. Jenneyer, 466.  
 Daubeny v. Cockburn, 413.  
 Davidson, *In re*, 197.  
 Davies v. Ashford, 196.  
 — v. Davies, 381, 402.  
 — v. Goodhue, 171.  
 — v. Hodgson, 323.  
 — v. Jenkins, 330.  
 — v. London and Provincial Marine Insurance, 415.  
 — v. Panton, 312, 313.  
 — v. Stainbank, 423.  
 — v. Topp, 260.  
 Davis v. Dendy, 287.  
 — v. Duke of Marlborough, 519.  
 Davis v. Hannon, 142.  
 — v. Kennedy, 503.  
 — v. Lane, 432.  
 — v. Page, 217.  
 — v. Symonds, 375.  
 Davoue v. Fanning, 133, 145.  
 Dawkins v. Lord Penrhyn, 100.  
 Dawson v. Bank of Whitehaven, 295.  
 — v. Clarke, 151.  
 — v. Dawson, 441.  
 Deacon v. Colquhoun, 118.  
 — v. Smith, 225.  
 Dean v. McDowell, 433.  
 Dearle v. Hall, 92.  
 Debenham v. Ox, 400.  
 De Busche v. Alt, 407.  
 De Cordova v. De Cordova, 371.  
 Deeks v. Strutt, 165.  
 Deerpur v. St. Albans, 64.  
 De Manneville v. De Manneville, 347.  
 Dempsey v. Bush, 420.  
 Dent v. Bennet, 403.

— v. Dent, 135.  
 Denton v. Donner, 406.  
 Dering v. Winchelsea, 421.  
 De Tastet v. Shaw, 426.  
 Devaynes v. Noble, 376.  
 Devese v. Pontet, 234.  
 De Visme, *In re*, 120.  
 Devoy v. Devoy, 121.  
 DeWitt v. Yates, 235.  
 Dicker v. Angerstein, 293.  
 Dickinson v. Burrell, 97.  
 Dietrichsen v. Cabburn, 429, 454.  
 — v. Parker, 203, 219.  
 Dimech v. Corlett, 312, 313.  
 Diplock v. Hammond, 92.  
 Distilled Spirits, *The*, 39.  
 Dixon v. Dickson, 324.  
 — v. Ewart, 381.  
 — v. Gayfere, 130, 196.  
 Doble, *Ex parte*, 85, 88.  
 Dobson, *re*, 178.  
 Docker v. Somes, 145, 147, 439.  
 Dodge v. Williams, 171.  
 Doe v. Gay, 165.  
 — v. Manning, 85.  
 — v. Rushman, 86.  
 Doherty v. Allman, 495.  
 Doleret v. Rothschild, 457.  
 Donaldson v. Donaldson, 77, 79, 140.  
 Donne v. Hart, 317.  
 Dormer v. Fortescue, 360.  
 Doty v. Mitchell, 331.  
 Douglas v. Culverwell, 279.  
 Dowling v. Betjemann, 457.  
 Downe v. Morris, 284.  
 Downs v. Jennings, 344.  
 Downshire v. Sandys, 494.  
 Dow v. Wheldon, 409.  
 Drant v. Vause, 175, 177.  
 Drewe v. Corp, 475.  
 Drew v. Martin, 119, 120.  
 — v. Power, 157.  
 Drysdale v. Mace, 470.  
 Duffield v. Elwes, 158, 164, 358.  
 Dugdale v. Dugdale, 262.  
 Dunmer v. Pitcher, 215.  
 Duncuft v. Albrecht, 457.  
 Dundas v. Dutens, 67, 466.  
 Dunlap, v. Dunlap, 258.  
 Dunnage v. White, 372.  
 Dunne v. Dunne, 135.  
 Durham v. Legard, 476.  
 — v. Lrod v. Wharton, 212.  
 Dutton, *Re*, 111.  
 Duval v. McLoskey, 283.  
 Dyer v. Dyer, 115, 118, 193.  
 Dyke v. Randall, 130.

## E.

Eads v. Williams, 478.  
 Earle v. Hopwood, 97.  
 Earlom v. Saunders, 171.  
 — v. Donald, 378.  
 — v. Henchman, 407.  
 East Indian Company v. Veerasawmy Moodely, 464.  
 Eastwood v. Vinke, 231.  
 Eaves v. Hickson, 141.  
 Ebrand v. Dancer, 117, 119.  
 Ede v. Knowles, 298.  
 Edmunds v. Lowe, 232.  
 Edwards v. Clay, 459.  
 — v. Freeman, 364.  
 — *In re*, 351.  
 — v. Jones, 75, 158, 160.  
 — v. M'Leay, 389, 469.  
 Edwards v. Rainer, 235.  
 — v. Warden, 147.



— *v. West*, 174.  
 Edgerton *v. Bronlow*, 62.  
 Elibank *v. Montolieu*, 342.  
 Ellard *v. Llandaff*, 389.  
 Ellice *v. Roupell*, 511.  
 Elliot *v. Merryman*, 108.  
     *Ex parte*, 82.  
     *v. Fisher*, 178.  
     *v. Turner*, 307.  
 Ellis *v. Lewis*, 213.  
     *v. Selby*, 110.  
 Ellison *v. Ellison*, 362.  
 Ellison *v. Moffatt*, 43.  
 Emuss *v. Smith*, 176, 178, 272.  
 England *v. Curling*, 427, 428.  
     *v. Downes*, 343, 344.  
     *v. Tredegar*, 358.  
 Ernest *v. Croysdill*, 155.  
 Errington *v. Aynsley*, 454.  
 Eskridge *v. McClure*, 130.  
 Esposito *v. Bowden*, 430.  
 Essex *v. Atkins*, 322.  
 European Bank, 307.  
     *v. Brumridge*, 423.  
     *v. Llewellyn*, 370, 395.  
 Evans *v. Wyatt*, 261.  
     *v. Kittrell*, 453.  
 Ewing *v. Osbaldiston*, 453.  
 Ewing *v. Smith*, 331.  
 Eykyn's Trusts, *In re*, 119.  
     *v. Hughes*, 268.

## F.

FAITHFUL *v. Ewen*, 306.  
 Falcke *v. Gray*, 457.  
 Fales *v. Russell*, 358.  
 Farebrother *v. Gibson*, 479.  
 Farina *v. Silverlock*, 502.  
 Farley, *Ex parte*, 238.  
 Farmer *v. Farmer*, 396.  
     *v. Martin*, 413.  
 Farquhar *v. City of Toronto*, 92.  
 Farquharson *v. Cave*, 161.  
     *v. Floyer*, 262, 271.  
 Farrant *v. Blanchford*, 156.  
     *v. Lovel*, 286.  
 Fawell *v. Heelis*, 131.  
 Featherstonhaugh *v. Fenwick*, 134, 430.  
 Fell *v. Brown*, 284.  
 Fellowes *v. Gwydyr*, 386.  
 Fellows *v. Mitchell*, 149.  
 Fells *v. Read*, 458.  
 Feltham *v. Clark*, 94.  
 Fenton *v. Wills*, 260.  
 Ferguson *v. Paschall*, 457.  
 Ferguson *v. Fish*, 483.  
 Ferris *v. Mullins*, 297.  
 Fettiplace *v. Gorges*, 318, 322.  
     *v. Evans*, 337.  
 Field *v. Schieffelin*, 108.  
     *v. Sowle*, 328.  
 Fielding *v. Preston*, 167, 261, 262.  
 Filley *v. Fassett*, 502.  
 Finch *v. Hattersley*, 256.  
 Fisher *v. Banta*, 171.  
 Fishmongers' Company *v. East India Company*, 496.  
 Fitch *v. Weber*, 180, 186.  
 Fleming *v. Buchanan*, 262.  
 Fletcher *v. Ashburner*, 169.  
 Flight *v. Bolland*, 455.  
 Fluker *v. Taylor*, 440.  
 Foley *v. Hill*, 442.  
 Folsom *v. Marsh*, 501.  
 Forbes *v. Adams*, 194.  
 Ford *v. Hopkins*, 155.  
     *v. White*, 32.  
 Forrest *v. Forrest*, 119.

Forster *v. Hale*, 59.  
 Fortescue *v. Barnett*, 74.  
 Fosbrooke *v. Balguy*, 144.  
 Foster *v. Davis*, 142.  
     *v. Foster*, 182.  
     *v. M'Kinnon*, 145.  
     and Lister, 87.  
 Fothergill *v. Fothergill*, 362.  
     *v. Rowland*, 490.  
 Fourdrin *v. Gowdey*, 114, 274.  
 Fowler *v. Fowler*, 246, 375.  
 Fowler's Trust, *Re* 205.  
 Fox *v. Buckley*, 155.  
     *v. Mackreth*, 245, 388, 406.  
 Foxcroft *v. Lester*, 464.  
 Francis *v. Francis*, 306.  
     *v. Wigzell*, 332.  
 Franco *v. Bolton*, 619.  
 Frank *v. Frank*, 193.  
 Fraser *v. Byng*, 236.  
     *v. Pope*, 83.  
     *v. Lomas*, 447.  
 French *v. Baron*, 287.  
     *v. Griffin*, 386.  
     *v. Hobson*, 156.  
     *v. Macale*, 310.  
 Freshfield's Trust, *In re*, 94.  
 Frewen *v. Frewen*, 178.  
 Frith *v. Cartland*, 155.  
 Fryer, *In re*, 149.  
 Fullager *v. Clarke*, 383.  
 Fuller *v. Benet*, 59.  
 Fullwood *v. Fullwood*, 20.  
 Fytche *v. Fytche*, 220.

## G.

GAINSFORD *v. Dunn*, 273.  
 Gale *v. Gale*, 85, 89.  
     *v. Lindo*, 399.  
 Galsworthy *v. Strutt*, 313.  
 Galveston R. Co. *v. Cowdry*, 286.  
     *v. Parker*, 164.  
 Garrard *v. Lauderdale*, 89.  
 Garson *v. Green*, 130.  
 Garth *v. Cotton*, 494.  
 Garthshore *v. Chalie*, 227.  
 Geddings *v. Seward*, 163.  
 Gedge *v. Montrose*, 486.  
 Gee *v. Pritchard*, 501.  
 General Estates Co., *In re* 96.  
     Meat Supply Association *v. Bouffler*, 96.  
 Gervis *v. Gervis*, 261.  
 Gething *v. Keighley*, 442.  
 Gibbins *v. Eyden*, 261, 271.  
 Gibbons *v. Caunt*, 370.  
 Gibson *v. Rees*, 90.  
     *v. Overton*, 77, 78.  
 Giles *v. Giles*, 379.  
 Gill *v. Downing*, 136.  
 Gillispie *v. Hamilton*, 429.  
     *v. Moon*, 473.  
 Gillies *v. Longlands*, 192, 197.  
 Gilman *v. Brown*, 129.  
 Gilman *v. Bridge Co.*, 286.  
 Glass *v. Ellison*, 283.  
 Glass *v. Hulbert*, 473.  
 Glenorchy *v. Bosville*, 63.  
 Glenn *v. Statier*, 374.  
 Glover *v. Hall*, 320.  
     *v. Hartcup*, 232.  
 Godfrey *v. Godfrey*, 100.  
 Godfrey *v. Watson*, 287, 288.  
 Goldieut *v. Townsend*, 467.  
 Goldsmid *v. Goldsmid*, 226, 230.  
 Goleborn *v. Alcock*, 25.  
 Gomez, *Ex parte*, 451.  
 Good *v. Harris*, 320.

Goodman v. Whitcomb, 432.  
 Goodson v. Richardson, 497.  
 Gould v. Teague, 178.  
 Gordon v. Gordon, 371.  
     *In re*, 196.  
 Gore v. Knight, 323.  
 Gough v. Bult, 107.  
 Gould v. Bugbee, 310.  
 Gould v. Okedeo, 396.  
 Gould v. Robertson, 90.  
 Gourley v. Linsenbigler, 158.  
 Grace, *Ex parte*, 307.  
 Graham v. Johnson, 95.  
     v. Londonderry, 270, 319, 340, 339.  
 Grenard v. Dunkin, 501.  
 Grant v. Grant, 319, 340.  
 Graves v. Graves, 255.  
 Gray v. Chiswell, 435.  
 Great Luxembourg R. Co. v. Magnay, 145.  
 Green v. Bridges, 314.  
     v. Farmer, 443.  
     v. Lyon, 2.  
     v. Marsden, 101.  
     v. Price, 313.  
     v. Winter, 144.  
 Greenaway, *Ex parte*, 366.  
 Greene v. Greene, 259.  
 Greenwood v. Greenwood, 234, 371.  
 Gregory v. Lockyer, 332.  
     v. Mighell, 463.  
     v. Wilson, 314.  
 Grenfel v. Dean and Canons of Windsor, 96.  
 Gresley v. Mousley, 404.  
 Gretton v. Haward, 204.  
 Greville v. Browne, 273.  
 Grey v. Grey, 122.  
 Grice v. Richardson, 305.  
 Griesbach v. Fremantle, 196.  
 Grievson v. Kirsopp, 171.  
 Griffin v. Griffin, 297.  
 Griffith v. Ricketts, 172, 188.  
 Grissell's Case, 446.  
 Grove v. Price, 152.  
 Groves v. Groves, 118.  
 Gude v. Worthington, 106.  
 Gunter v. Halsey, 462, 460.  
 Gwynne v. Edwards, 267.

## H.

HADDON v. Fladgate, 318.  
 Haigh v. Jagger, 480.  
     v. Webb, 365.  
 Hall, *Ex parte*, 92.  
     v. Hall (Atk. 721), 349.  
     v. Hall (12 Beav. 414), 426, 430.  
     v. Hall (L. R. 8 Ch. App. 430) 413, 516.  
     v. Hill, 236, 247.  
     v. Paddock, 504.  
     v. Potter, 399.  
     v. Waterhouse, 322.  
 Hamer v. Giles, 446.  
 Hamilton v. Watson, 416.  
     v. Wright, 143, 406.  
 Hammersley v. De Biel, 466.  
 Hammersley v. Smith, 385.  
 Hanbury v. Kirkland, 149.  
 Hanby v. Roberts, 271.  
 Hannah v. Hodgson, 402.  
 Hannaker v. Schroers, 313.  
 Hansard v. Robinson, 360, 361.  
 Hanson, *Ex parte*, 131, 448.  
     v. Derby, 290, 291.  
     v. Millett, 159.  
 Harden v. Parsons, 156.  
 Hardy, *Ex parte*, 175.

    v. Martin, 311.  
 Harwood v. Oglander, 253, 260, 271.  
 Harms v. Parson, 400.  
 Harnett v. Yielding, 452, 479.  
 Harris v. Knickerbocker, 461.  
 Harrison v. Forth, 34.  
     v. Guest, 390, 391.  
     v. Harrison, 100.  
     v. Nettleship, 487.  
     v. Tennant, 431.  
 Hart v. Swaine, 475.  
 Hartwell v. Hartwell, 401.  
 Harvard College v. Amory, 153.  
 Hastie v. Hastie, 155.  
 Hatch v. Hatch, 213, 403.  
 Hatfield v. Minet, 245.  
 Hawes v. Wyatt, 375.  
 Hawkins v. Blewitt, 163.  
     v. Day, 364.  
     v. Holmes, 462.  
 Hawley v. James, 141, 173, 184.  
 Hawthorn v. Shedden, 167, 262.  
 Haycock's Policy, *In re*, 442.  
 Hayes v. Garvey, 247.  
 Haymes v. Cooper, 306.  
 Haynes v. Mico, 231, 233.  
 Headley v. Redhead, 261.  
 Heap v. Tonge, 89.  
 Hearle v. Greenbank, 138, 210.  
 Heath v. Crealock, 31.  
     v. Sansom, 429.  
 Heatley v. Thomas, 328.  
 Heighington v. Grant, 157.  
 Henderson v. Graves, 36.  
 Henderson v. Dickey, 373.  
 Henkle v. Royal Exchange Association Company, 472.  
 Hensman v. Fryer, 261, 271, 272.  
 Herbert v. Salisbury and Yeovil Railway Company, 311.  
 Hercy v. Birch, 439, 455.  
 Hervey v. Hervey, 362.  
 Hewison v. Negus, 87.  
 Hewitt v. Loosemore, 299, 38.  
     v. Kaye, 164.  
     v. Wright, 173.  
 Heydon's Case, 5.  
 Hibbert v. Cooke, 135.  
     v. Rolleston, 381.  
 Hickley v. Hickley, 146.  
 Hiern v. Mill, 299.  
 Higgins v. Samels, 479.  
     v. Senior, 118.  
 Higgs v. Schrader, 306.  
 Hill v. Barclay, 314.  
     v. Buckley, 476.  
     v. Caillovel, 95.  
     v. Lane, 384.  
 Hilliard v. Fulford, 251.  
 Hillman, *Ex parte*, 35, 88.  
 Hilton v. Barrow, 519.  
 Hinchinbroke v. Seymour, 413.  
 Hinksman v. Smith, 409.  
 Hindmarsh, *In re*, 438.  
 Hinricks v. Berndes, 487.  
 Hipwell v. Knight, 478.  
 Hitchman v. Stewart, 321.  
 Hobson v. Blackburn, 274.  
 Hobson v. Trevor, 91.  
 Hodgen v. Guttery, 284.  
 Hodgson v. Fox, 447.  
     v. Hodgson, 322.  
     v. Shaw, 420.  
 Hofman, *In re*, 284.  
 Hogg v. Kirby, 498.  
 Holderstaffe v. Saunders, 487.  
 Holdich v. Holdich, 213.  
 Holland v. Holland, 155.  
 Holloway v. Millard, 82.  
     v. Radcliffe, 192.

Holman v. Loynes, 404.  
 Holme v. Brunskill, 423.  
 Holmes v. Coghill, 262.  
 — v. Penney, 84.  
 Holroyd v. Marshall, 91.  
 Holt v. Frederick, 120.  
 — v. Holt, 135, 290.  
 Holyman, *Ex parte*, 407.  
 Honeyman v. Marryat, 478.  
 Honor v. Honor, 371.  
 Honeywood v. Forster, 217.  
 Hood v. Hood, 190.  
 Hooley v. Hatton, 235.  
 Hooper v. Smart, 257.  
 Hope v. Carnegie, 484.  
 Hopper v. Conyers, 155.  
 Hore v. Becher, 373.  
 Horner v. Flintoff, 312.  
 Horner v. McGaughy, 231.  
 Horrock v. Rigby, 476.  
 Houston v. Embry, 321.  
 Hough v. Richardson, 38.  
 Hovey v. Blakeman, 150.  
 Howard v. Digby, 339.  
 — v. Harris, 278.  
 — v. Hopkyns, 310.  
 Howe v. Hunt, 479.  
 — v. Lord Dartmouth, 153.  
 Howel v. Price, 282.  
 Howorth v. Dewell, 10.  
 Howson v. Hancock, 401.  
 Hudson v. Bartram, 478.  
 Hudson v. Buck, 480.  
 Hue v. Richards, 431.  
 Hughes v. Jones, 42.  
 — v. Kearney, 128, 139.  
 — v. Morris, 464.  
 — v. Wynne, 554.  
 Hulme v. Coles, 424.  
 Hulme v. Tenant, 321, 328, 332.  
 Humphrey v. Richards, 324.  
 Hungerford v. Clay, 290.  
 Hunt v. Rousmaniere, 368.  
 Hunter v. Belcher, 442.  
 — v. Daniel, 97.  
 Huntington v. Huntington, 295.  
 Hurd v. Billington, 521.  
 Hurst v. Beach, 166, 236.  
 Huson v. Wallace, 134.  
 Hutchinson v. Tennant, 100.  
 Hylton v. Hylton, 403.

## I.

IMBEKT, *Ex parte*, 449.  
 Imbush v. Farwell, 435.  
 Imperial Mercantile Credit Association  
 v. Coleman, 145, 407.  
 Ingle v. Richards, 406.  
 Inglesfield v. Coghlan, 320.  
 Innes v. Sayer, 112, 362.  
 Irnham v. Child, 368.  
 Irvine v. Ironmonger, 260.  
 Isaacson v. Harwood, 155.  
 Isler v. Baker, 432.  
 Izod v. Izod, 106.

## J.

JACKSON v. Innes, 295.  
 — v. Jackson, 126.  
 — v. Parker, 295.  
 Jackson v. Philips, 111.  
 Jacob v. Lucas, 152.  
 Jacobs, *Ex parte*, 424.  
 — *In re*, 424.  
 Jacquet v. Jacquet, 254.  
 James v. Dean, 134.

James v. James, 297.  
 — v. Kynnier, 445.  
 — v. Rice, 298.  
 — v. Rumsey, 289.  
 Jamison v. Brady, 320.  
 — v. Glasscock, 145.  
 Jaques v. Miller, 475.  
 Jaques v. M. E. Church, 331.  
 Jarman's Estate, *In re*, 111.  
 Jauncy v. Knowles, 432.  
 Jeffereys v. Small, 126.  
 Jefferson v. Bishop of Durham, 482, 493.  
 Jefferys v. Fairs, 470.  
 — v. Jefferys, 69, 453.  
 Jeffrys v. Vanteswarstwarth, 349.  
 — v. Wood, 444.  
 Jenney v. Andrews, 325.  
 Jennings v. Ward, 279.  
 Jervoise v. Duke of Northumberland,  
 62.  
 — v. Jervoise, 340.  
 Jessop v. Watson, 184, 186.  
 Job v. Job, 485.  
 Johns v. James, 90.  
 — v. Child, 271.  
 — v. Gallacher, 331.  
 — v. Lawson, 153.  
 — v. Legard, 89.  
 — v. Lord Harrowby, 274.  
 — v. Ogilby, 401.  
 Johnson's infants, *In re*, 347.  
 Johnstone v. Lumb, 325.  
 Jones' Appeal, 331.  
 — *In re*, 260.  
 Jones v. Caldwell, 171.  
 — v. Caless, 160.  
 — v. Clifford, 374, 469.  
 — v. Davies, 295.  
 — v. Green, 313.  
 — v. Higgins, 323.  
 — v. Jones, 211.  
 — v. Lewis, 142, 364.  
 — v. Lock, 71.  
 — v. Noy, 432.  
 — v. Powles, 154.  
 — v. Selby, 162, 164.  
 — v. Smith, 36, 301, 302.  
 — v. Thomas, 506.  
 — v. Williams, 299.  
 Jordan v. Money, 469.  
 Joy v. Campbell, 142, 151, 155.  
 Joyce v. De Moleyns, 30.  
 Joynes v. Statham, 468, 470.

## K.

KANE v. Vanderberg, 494.  
 Kay v. Johnson, 308.  
 — v. Smith, 156.  
 Kearney v. Maccombe, 21.  
 Kearsley v. Cole, 425.  
 Keat v. Allen, 399.  
 Keech v. Hall, 257.  
 — v. Sandford, 133, 145.  
 Keene v. Biscoe, 279.  
 Keily v. Monck, 400.  
 Kekewich v. Manning, 78.  
 Kelly & Co., *Ex parte*, 461.  
 Kemble v. Farren, 312.  
 Kemp v. Pryor, 353, 520.  
 — v. Westbrook, 301, 302.  
 Kempson v. Ashbee, 402.  
 Kendall, *Ex parte*, 268.  
 — v. Abbott, 373, 379.  
 — v. Hamilton, 376.  
 Kennedy v. Daly, 154.  
 — v. Kennedy, 431.  
 Kennerly v. Johnson, 218.  
 Kensington, *Ex parte*, 298.

— *v. Dollond*, 321.  
*Kerr v. Bain*, 407.  
*Keys v. Williams*, 297.  
*Kidney v. Cousmaker*, 218, 257.  
*Kiffin v. Kiffin*, 349.  
*Kimber v. Barber*, 145.  
*Kimm v. Weippert*, 332.  
*Kinderley v. Jervis*, 356.  
*King v. Denison*, 122.  
— *v. Hamlet*, 410.  
— *v. King*, 210.  
— *v. Savery*, 410.  
— *v. Smith*, 286, 492.  
— *v. Timmerman*, 361.  
*Kinnaird v. Webster*, 426.  
*Kip v. Deniston*, 149.  
*Kirk v. Bromley Union*, 464.  
— *v. Clark*, 87.  
— *v. Eddowes*, 247, 248.  
*Kirkham v. Miles*, 196.  
*Knatchbull v. Creuber*, 42, 474, 475.  
*Knight v. Bowyer*, 97.  
— *v. Knight*, 99.  
*Knox v. Easton*, 283.  
*Knox v. Gye*, 146, 432.  
*Kreiser's Appeal*, 218.  
*Kronheim v. Johnson*, 77, 58.

## L.

*LACEY, Ex parte*, 405, 406.  
— *v. Hill*, 435.  
*Lacon v. Allen*, 298.  
— *v. Mertens*, 462.  
*Laidlaw v. Organ*, 388.  
*Lake v. Brutton*, 425.  
— *v. De Lambert*, 138.  
— *v. Gibson*, 125, 126, 134.  
*Lambarde v. Older*, 447.  
*Lambe v. Eames*, 100, 102.  
*Lamplugh v. Lamplugh*, 121.  
*Lamson v. Drake*, 284.  
*Lancaster v. Dolan*, 331.  
*Lance v. Aglionby*, 259.  
— *v. Norman*, 348.  
*Lancefield v. Iggulden*, 261, 262, 271, 272.  
*Lane v. Dighton*, 118.  
*Lanesborough v. Jones*, 444.  
*Langley v. Thomas*, 104.  
*Langdon v. Astor*, 238.  
— *v. Horton*, 94, 485.  
*Lanoy v. Duke of Athole*, 268.  
*Lassence v. Tierney*, 465.  
*La Touche v. Earl of Lucan*, 90.  
*Laveille, Re* 339.  
*Laver v. Fielder*, 43.  
*Law v. East India Co.*, 426.  
*Lawes v. Bennett*, 174, 176.  
*Lawrence v. Lawrence*, 213, 359.  
— *v. Smith*, 498.  
*Lear v. Choteau*, 453.  
*Leary v. Shout*, 432.  
*Leaver v. Clayton*, 111.  
*Lechmere v. Brotheridge*, 322.  
— *v. Earl of Carlisle*, 220, 224.  
— *v. Lechmere*, 188.  
*Lee v. Boak*, 164.  
— *v. Clutton*, 34, 38.  
— *v. Averstreet*, 313.  
— *v. Pain*, 286.  
*Lees v. Nuttal*, 407.  
*Lefevre v. Lefevre*, 213.  
*Legal v. Miller*, 474.  
*Legg v. Goldwire*, 177.  
*Leggett v. Dubois*, 118.  
— *v. Hunter*, 142.  
*Leigh v. Earl of Warrington*, 255.  
*Leigh's Estate, In re*, 135.  
*Leith v. Irvine*, 278.

*Lempriere v. Lange*, 396.  
*Lench v. Lench*, 117, 131, 226.  
*Le Neve v. Le Neve*, 33, 38.  
*Leonard v. Sussex*, 69.  
*Leslie's Settlement Trusts, In Re*, 135.  
*Lester v. Foxcroft*, 463.  
*Leveson, In Re*, 276.  
*Levy v. Walker*, 431.  
*Lewellin v. Cobbold*, 344.  
*Lewis v. Fullerton*, 498.  
— *v. Hillman*, 404.  
— *v. Nangle*, 283.  
— *v. Nobbs*, 147.  
— *Rees*, 86.  
*Liddard v. Liddard*, 100.  
*Lilford, Lord, v. Powys-Keck*, 272.  
*Lincoln v. Wright*, 468.  
*Linden, Ex parte*, 307.  
*Lindsay v. Gibbs*, 91.  
— *v. Harrison*, 335.  
*Little v. Neil*, 107.  
*Lloyd v. Atwood*, 156.  
— *v. Clark*, 484.  
— *v. Passingham*, 55.  
*Lockhart v. Hardy*, 293, 294.  
*Lockwood v. Ewer*, 302.  
*London Assurance Company v. Mansel*, 390.  
— *Chartered Bank of Australia v. Lempriere*, 326.  
— *v. Winchester*, 500.  
*Longmate v. Ledger*, 392, 395.  
*Longendale Cotton Spinning Co., In Re*, 460.  
*Loscombe v. Russell*, 433.  
— *v. Wintringham*, 112.  
*Lovell's Case*, 284.  
*Loveridge v. Cooper*, 21.  
*Lovett v. Lovett*, 524.  
*Lowther v. Lowther*, 407.  
*Lucas v. Comerford*, 454.  
*Luckraft v. Pridham*, 275.  
*Luke v. South Kensington Hotel Company*, 284.  
*Lumb v. Milnes*, 321.  
*Lumley v. Wagner*, 453, 489.  
*Lunham v. Blundell*, 143.  
*Lupton v. Lupton*, 258.  
*Lupton v. White*, 143, 155.  
*Lush's Trusts, In re*, 156.  
*Lutkins v. Leigh*, 271.  
*Lynch v. Willard*, 438.  
*Lyon v. Home*, 403.  
*Lysaght v. Walker*, 449.

## M.

*MACAULEY v. Phillips*, 342.  
*Macbryde v. Weeks*, 478.  
*Macclesfield v. Davis*, 458.  
— *v. Irvine*, 153.  
*McDonough v. Jaynor*, 526.  
*Macbryde v. Burroughs*, 332.  
*Mackenzie v. Johnston*, 438.  
— *v. Robinson*, 290.  
*Mackinnon v. Stewart*, 90.  
*Mackreth v. Symmons*, 128, 129.  
*Macpherson v. Watt*, 145.  
*Maddox v. Maddox*, 400.  
*Maddy v. Hale*, 135.  
*Madeley v. Booth*, 475.  
*Mainwaring v. Newman*, 436.  
*Maitland v. Irving*, 419.  
*Major v. Lansley*, 322.  
*Malden v. Menill*, 366, 372.  
*Malins v. Freeman*, 470.  
*Maltby's Case*, 418.  
*Manby v. Bewicke*, 394.  
*Manlove v. Bale*, 288.

- Manley v. Slason, 128.  
 Manning v. Purcell, 167.  
     — v. Spooner, 260.  
 Mansell v. Mansell, 362.  
 Manson v. Baillie, 140.  
     — v. Thacker, 476.  
 Marble Co. v. Ripley, 455.  
 Marc v. Sandford, 412.  
 Marshall v. Coleman, 428.  
     — v. Ross, 503.  
     — v. Shrewsbury, 293, 297.  
     — v. Stephens, 331.  
 Martin v. Morgan, 389.  
     — v. Nutkin, 454, 489.  
     — v. Pycroft, 470.  
     — v. Trimmer, 197.  
 Mason v. Morley, 155.  
     — v. Seney, 402.  
     — v. Taylor, *In re*, 305.  
 Massey v. Parker, 321.  
 Massie v. Watts, 460.  
 Master v. Fulmer, 323.  
 Mathew v. Northern Assurance Com-  
     pany, 442.  
 Matthew v. Brise, 143, 346.  
 Matthews v. Wallwyn, 442.  
 Matthewman's Case, 350.  
 Maunsell v. White, 469.  
 Maxwell v. Montacute, 279, 468.  
 May v. Hook, 487.  
     — v. Roper, 194.  
 Mayd v. Field, 243-330.  
 Mayer v. Murray, 289, 485.  
 Mayhew v. Crickett, 425.  
 M'Cann v. Dempsey, 395, 405.  
 McCarty v. Deeming, 179.  
 M'Donnell v. Hesilrige, 85.  
 McDonough v. Murdock, 138.  
 Mechanics' Bank v. Seton, 456.  
 Meek v. Kettlewell, 78.  
 Meggison v. Moore, 99.  
 Melchor v. Becerger, 212.  
 Mellers v. Devonshire (Duke of) 365.  
 Meluish v. Milton, 19, 380.  
 Meredith v. Heneage, 100.  
 Messenger v. *In Re*, 305.  
 Metcalf v. Cooke, 331.  
     — v. Hutchinson, 256.  
 Mews v. Mews, 319.  
 M'Fadden v. Jenkins, 76, 59.  
 McFait's Appeal, 260.  
 M'Henry v. Davies, 328.  
 Miall v. Brain, 213.  
 Micklethwaite v. Micklethwaite, 494.  
 Middleton v. Pollock, 82.  
     — v. Spicer, 124.  
 Mignan v. Parry, 377.  
 Mildmay v. Quicke, 182.  
 Miles v. Harrison, 115, 275.  
     — v. Thomas, 428.  
 Mill v. Hill, 133.  
 Miller v. Beal, 285.  
     — v. Ball, 460.  
 Millett v. Davy, 291.  
 Mills v. Farmer, 113.  
     — v. Fowkes, 450.  
     — v. Haywood, 478.  
 Milltown, Earl of, v. Stewart, 518.  
 Milner v. Milner, 379.  
 Milnes v. Slater, 260-261.  
 Milroy v. Lord, 80, 81.  
 Milward v. Thanet, 478.  
 Miner v. Miner, 348.  
 Mirehouse v. Scaife, 261.  
 Mitchell v. Smith, 160.  
 Mitchell's Trade Mark, *In re*, 502.  
 M'Kenzie v. Hesketh, 477.  
 McNeas, v. Swaney, 279.  
 M'Neile, v. Chambers, 351.  
 Moet v. Pickering, 306.  
 Moggridge v. Thackwell, 111-113.  
 Molony v. Kennedy, 325.  
 Monck v. Monck, 238.  
 Montacute v. Maxwell, 408.  
 Montague v. Dudman, 487.  
     — v. Flockton, 491.  
 Montefiore v. Brown, 90.  
 Montefiori v. Montefiori, 467.  
 Moodie v. Reid, 381.  
 Moore v. Blake, 478.  
     — v. Darton, 159, 162.  
     — v. Moore, 164.  
     — v. Vinten, 316.  
 Morgan v. Higgins, 405.  
     — v. Malleson, 159.  
     — v. Minett, 403.  
     — v. Morgan, 323.  
 Morrice v. Bishop of Durham, 110.  
 Morley v. Bird, 125-44.  
     — v. Morley, 142, 146.  
 Mornington v. Keane, 225.  
 Morphett v. Jones, 463.  
 Morrell v. Wootten, 92.  
 Morret v. Paske, 145.  
 Morrice v. Bank of England, 486.  
 Morris v. Barrett, 126.  
     — v. Chambers, 139.  
     — v. Morris, 494.  
 Morrow v. Brenizer, 179.  
 Mortimer v. Capper, 366, 374.  
 Mortlock v. Buller, 477, 479.  
 Moseley v. Virgin, 454.  
 Moses v. Mungatroyd, 90, 421.  
 Moss, *Ex parte*, 297.  
 Mountfort, *Ex parte*, 349, 302.  
 M'Pherson v. Watt, 407.  
 M'Queen v. Farquhar, 476.  
 M'Queen v. M'Queen, 217.  
 Muckleston v. Brown, 104.  
 Mucklow v. Fuller, 148.  
 Muller v. Daws, 47.  
 Mullins v. Smith, 168.  
 Mundy v. Jolliffe, 463.  
 Murray v. Barlee, 253-318-328-329-330.  
     — v. Parker, 375.  
 Nutlow v. Biggs, 196.

## N.

- NASH v. Hodgson, 450.  
 National Bank of Australasia v. United  
     Hand in Hand and Bank of Hope  
     Company, 288.  
 Naylor v. Winch, 371.  
 Neale v. Neale, 371.  
 Neesom v. Clarkson, 492.  
 Neilson v. Betts, 439.  
 Nelson v. Stocker, 42, 344, 387.  
 Nerot v. Burnhard, 429.  
 Neville's Case, 424.  
 Neville v. Wilkinson, 399, 467.  
 Newlands v. Paynter, 320, 324, 336, 485.  
 Newman v. Selfe, 293.  
 New Sombbrero Company v. Erlanger,  
     145.  
 Newstead v. Searles, 89.  
 Newton v. Charlton, 419.  
 Nichol v. Stockdale, 498.  
     — v. Tackaberry, 462.  
 Nicholson v. Hooper, 134, 492.  
     — v. Revell, 424, 425.  
 Nix v. Bradley, 320.  
 Nokes v. Gibbon, 314.  
 Norrington, *In re*, 143.  
 Norris v. Caledonian Insurance Com-  
     pany, 136.  
 Norris' Appeal, 156.  
 North v. Ansell, 392.

North British Insurance Company v. Lloyd, 417.  
 Nottidge v. Prince, 403.  
 Nottley v. Palmer, 212.  
 Noyes v. Crawley, 146, 432.

## O.

OAKES v. Turquand, 392.  
 O'Brien v. Lewis, 405.  
 O'Connor v. Spaight, 440.  
 Odessa Tramways v. Mendel, 457.  
 O'Driscoll v. Koger, 219.  
 Oldham v. Hughes, 193.  
 Oliver v. Brickland, 228.  
 Onions v. Cohen, 516.  
 Orby v. Trigg, 279.  
 Ormond v. Hutchinson, 370.  
 Osborn v. Morgan, 340.  
 — v. Phillips, 473.  
 — v. Williams, 401.  
 Oswell v. Probert, 341.  
 Overton v. Bainister, 32.  
 Owen v. Henshaw, 406.  
 Owen v. Homan, 328, 418.  
 Owens v. Dickenson, 253, 329, 333.

## P.

PADBURG v. Clark, 219.  
 Paddon v. Richardson, 152.  
 Padwick v. Hurst, 439, 441.  
 — v. Stanley, 420.  
 Page v. Bennet, 315.  
 Page v. Page, 118, 171.  
 Pain v. Coombs, 463.  
 Painter v. Newby, 477.  
 Palmer v. Hendrie, 294, 486.  
 — v. Neave, 477.  
 Palmer's Case, 451.  
 Pankhurst v. Howell, 238.  
 Papillon v. Voice, 66.  
 Perdo v. Bingham, 453, 462.  
 Parfitt v. Chambre, 310.  
 Paris skating Rink Co., *In re*, 97.  
 Parker v. Brook, 320.  
 Parker v. Foy, 131.  
 — v. Lewis, 357.  
 — v. Taswell 70, 472, 480.  
 Parkes v. White, 156.  
 Parkin v. Thorold, 478.  
 Farnell v. Hingston, 122.  
 Parrott v. Sweetland, 129.  
 Parsons v. Hayward, 430.  
 Patey v. Patey, 432.  
 Paulison v. Van Inderstine, 374.  
 Peachy v. Duke of Somerset, 45.  
 Peacock v. Evans, 409.  
 — v. Peacock, 430.  
 — v. Penson, 479.  
 Peacock's Estate, 245.  
 Peake v. Highfield, 516.  
 — v. Loman, 274.  
 Pearl v. Deacon, 425.  
 Peddler's Settlement, *Re*, 197.  
 Peek v. Gurney, 387.  
 Peets v. Lambert, 475.  
 Pemberton v. McGill, 323.  
 Pembroke v. Thorpe, 462.  
 Penford v. Mould, 80.  
 Penn v. Lord Baltimore, 47, 460.  
 Pennington v. Brinsop Hall Coal Company, 497.  
 Pennock's Estate, 101.  
 Pepper v. Lee, 320.  
 Percival v. Phipps, 501.  
 Perkins v. Ede, 472.  
 Perry v. Phelps, 486.

Persse v. Persse, 372.  
 Peterson's Appeal, 170.  
 Peto v. Brighton, Uckfield and Tunbridge Wells R'y, 490.  
 Petre v. Espinasse, 517.  
 Phillips v. Berger, 456.  
 — v. Parry, 260.  
 — v. Phillips (10 W. R. 327.), 26, 31.  
 — v. Phillips (1 M. & K. 649.), 434.  
 — v. Phillips (9 Hare, 475.), 439.  
 Philpot v. Jones, 449.  
 Picard v. Hine, 328.  
 Pickering v. Pickering, 370.  
 Pickersgill v. Rodger, 204.  
 Pidcock v. Bishop, 417.  
 Pierce v. Waring, 403.  
 Pigott v. Stratton, 414, 492.  
 — v. Williams, 445.  
 Pike v. Nicholas, 439.  
 Pilcher v. Arden, 306.  
 — v. Rawlins, 25, 154.  
 Pinchin v. Simms, 232.  
 Pinckney v. Pinckney, 258.  
 Pinnell v. Hallett, 224.  
 Pit v. Cholmondeley, 441, 157.  
 Playford v. Playford, 479.  
 Pledge v. Buss, 425.  
 Plumb v. Fluitt, 36.  
 Plunket v. Lewis, 247.  
 — v. Penson, 252.  
 Pocock v. Atty.-Gen, 109.  
 Pole v. Fitzgerald, 390.  
 Pollard v. Clayton, 459.  
 — v. Greenville, 362.  
 Polyblank v. Hawkins, 316.  
 Poole's Case, *In re*, 253.  
 Pooley v. Budd, 456.  
 — v. Quilter, 144, 407.  
 Pope v. Curl, 501.  
 Pope v. Pope, 100.  
 Pope's Trusts, *In re*, 319.  
 Portarlington v. Souby, 484.  
 Porter v. Baddeley, 153.  
 Pothonier v. Dawson, 302.  
 Potter v. Sanders, 33.  
 Powell v. Cleaver, 347.  
 Powell v. Cassidy, 171.  
 Powell v. Elliott, 476.  
 — v. Glover, 476.  
 — v. Hellicar, 163.  
 — v. Knowler, 97, 401.  
 — v. Powell, 366.  
 — v. Price, 351.  
 — v. Thomas, 42.  
 Powys v. Blagrave, 495.  
 — v. Mansfield, 239.  
 Pray's Appeal, 152.  
 Prendergast v. Devey, 424.  
 Prentice v. Jansen, 192.  
 Prescott, *Ex parte*, 444.  
 Price v. Barker, 425.  
 — v. Dyer, 474.  
 — v. Edmunds, 424.  
 — v. Jenkins, 85, 89.  
 — v. Macauley, 476.  
 — v. North, 255.  
 Pride v. Bubb, 322.  
 Primrose v. Broomley, 422.  
 Prince Albert v. Strange, 501.  
 Pringle v. Goak, 306, 446.  
 Pritchard v. Elton, 279.  
 Probert v. Clifford, 270.  
 Prole v. Soady, 467.  
 Prosser v. Edmonds, 97.  
 — v. Rice, 85.  
 Protheroe v. Forman, 487.  
 Proudfoot v. Montefiore, 390.  
 Proudley v. Fielder, 316, 325.  
 Frowse v. Abingdon, 274.



Prudential Assurance Company v. Knott, 487.  
 — v. Thomas, 506.  
 Pryce v. Bury, 297.  
 Pullen v. Ready, 368.  
 Pulsford, *In re*, 435.  
 — v. Richards, 385, 387.  
 Pultenay v. Darlington, 188-195-198.  
 Pulvertoft v. Pulvertoft, 89.  
 Pumfrey, *In re*, 85, 88.  
 Pusey v. Desbouvrie, 372.  
 — v. Pusey, 458.  
 Pybus v. Smith, 333.  
 Pye, *Ex parte*, 72, 238-240.  
 Pyke v. Northwood, 485.  
 Pym v. Blackburn, 365.  
 — v. Bowreman, 283.  
 — v. Lockyer, 237, 246.

## Q.

Q. CARRIER v. Colston, 518.  
 Queensberry (Duke of) v. Shebbeare, 501.

## R.

RAGGETT v. Findlater, 503.  
 Ramsdall v. Butler, 506.  
 Ramsden v. Dyson, 134-42.  
 — v. Hurst, 476.  
 Ramuz v. Crowe, 362.  
 Rand v. Cartwright, 284.  
 Randall v. Errington, 406.  
 Ranelagh v. Hayes, 420.  
 Rathburn v. Colton, 134.  
 Rawley v. Rawley, 446.  
 Rawlins v. Wickham, 385, 387, 431.  
 Rawson v. Samuel, 444, 445.  
 Rawstone v. Parr, 476, 419.  
 Read v. Brookman, 358.  
 Reddington v. Reddington, 121.  
 Redman v. Redman, 399.  
 Rede v. Oakes, 479.  
 Reece v. Trye, 458.  
 Reed v. Norris, 422.  
 Rees v. Berrington, 423.  
 Rees v. City of Watertown, 17.  
 Rehden v. Wesley, 151.  
 Reid v. Lamar, 331.  
 Reid v. Shergold, 362, 363.  
 Rennie v. Young, 134.  
 Reynard v. Arnold, 174.  
 — v. Spence, 219.  
 Reynell v. Sprye, 96, 401, 479.  
 Reynolds v. Godlee, 184-186.  
 Ribbans v. Crickett, 449.  
 Rice v. Rice, 22, 136, 411.  
 Rich v. Cockell, 211-320.  
 Richards v. Delbridge, 81.  
 — v. Lewis, 86.  
 — v. Revitt, 489.  
 Richardson v. Horton, 376.  
 Richmond v. White, 264.  
 Rickard v. Barrett, 271.  
 Riddle v. Emmerson, 59.  
 Rider v. Kidder, 120, 401.  
 Ridges v. Morrison, 235.  
 Ridgway v. Clare, 435.  
 — v. Gray, 477.  
 Ridley, *In re*, 334.  
 Rigden v. Vallier, 125, 44.  
 Ripley v. Waterwork, 179.  
 Ripon v. Hobart, 496.  
 Roach v. Trood, 413.  
 Roberts v. Appeal, 119.  
 Roberts v. Croft, 298.  
 — v. Dixwell, 323.  
 — v. Gordon, 196.

Roberts v. Roberts, 399, 401.  
 Robeson v. Hombaker, 461.  
 Robinson v. Buck, 217.  
 — v. Gee, 268.  
 — v. Geldard, 168, 274.  
 — v. Litton, 495.  
 — v. London Hospital (Governors of), 114, 188.  
 — v. Pett, 143.  
 — v. Preston, 125.  
 — v. Robinson, 154, 193, 342.  
 — v. Smith, 100.  
 Roch v. Callen, 235.  
 Rodick v. Gandell, 92.  
 Rodgers v. Jones, 204.  
 — v. Rodgers, 411.  
 Rolls v. Pearce, 164.  
 Rolt v. Somerville, 494.  
 Rook v. Worth, 197.  
 Roper v. Roper, 257.  
 Rossiter v. Miller, 480.  
 Ross' Trust, *In re*, 338.  
 Rowbotham v. Dunnnett, 105.  
 — v. Rowe, 232.  
 — v. Wood, 289.  
 Rowland v. Evans, 432.  
 Rowley v. Unwin, 324.  
 Russ v. Mills, 286, 495.  
 — v. Hankins, 232.  
 — v. Russell, 296, 297.  
 Russell v. Dickson, 235.  
 — v. St. Aubyn, 243.  
 Ryall v. Rowles, 84.  
 — v. Ryall, 117.  
 Ryan v. Mackmath, 519.

## S.

SAFFRON Walden Building Society v. Kayner, 38.  
 Sainter v. Ferguson, 313.  
 Sale v. Moore, 101.  
 Salisbury v. Bagott, 139.  
 Salmon v. Gibb's, 413.  
 Salusbury v. Denton, 107.  
 Salwey v. Salwey, 143.  
 Samuel v. Howarth, 423.  
 Sandon v. Hooper, 291.  
 Sarth v. Blanford, 362.  
 Saunders v. Dehew, 85, 25.  
 — v. Dunman, 308.  
 Savage v. Foster, 42, 156, 326.  
 Savery v. King, 402.  
 Sayer v. Sayer, 112.  
 Scales v. Collins, 273.  
 Schwen v. Blunt, 316.  
 Scawin v. Scawin, 121.  
 Scholefield v. Templar, 387.  
 Schoole v. Sall, 486.  
 — v. Hanson, 476.  
 Scott v. Henry, 284.  
 — v. Jones, 254.  
 — v. Rayment, 428.  
 — v. Spashett, 342.  
 — v. Tyler, 362, 400.  
 Sendamore v. Scudamore, 178.  
 Seagood v. Meale, 465.  
 Seaman v. Vawdrey, 477.  
 Searle v. Law, 73.  
 Sedgwick v. Daniell, 436.  
 Seely v. Jago, 191, 193.  
 Selby v. Selby, 267.  
 Sells v. Sells, 378.  
 Seton v. Slade, 478.  
 Sexton v. Wheaton, 84, 35.  
 Shackleton v. Sutcliffe, 476.  
 Shantels' Appeal, 371.  
 Sharp, *Re*, 324.  
 Sharrod v. N. W. Railway Co., 9.

- Shattock v. Shattock, 326, 327.  
 Shaw v. Fisher, 457.  
 — v. Neale, 306.  
 Shedd v. Goodrich, 212.  
 Sheen, *Ex parte*, 435.  
 Sheffield, *Ex parte*, 99.  
 — v. Duchess of Buckingham, 522.  
 — v. Eden, 284, 289.  
 — Waterworks v. Yeomans, 513.  
 Shelgrove v. Shelgrove, 218.  
 Shelley's Case, 62.  
 Shelley v. Westbrooke, 549.  
 Shepherd, *In re*, 319.  
 Shirley v. Stratton, 479.  
 Short v. Battle, 331.  
 Shovelton v. Shovelton, 100.  
 Shubrook, *Ex parte*, 305.  
 Shuttleworth v. G-eaves, 215.  
 Sidmouth v. Sidmouth, 118, 121, 122.  
 Siegert v. Findlater, 503.  
 Simmins v. Shirley, 288.  
 Simmons v. Simmons, 318.  
 Simms v. Lyle, 356.  
 Simpson v. Howden (Lord), 487, 521.  
 — v. Lamb, 97.  
 Simon v. Ingham, 449.  
 Singer Manufacturing Company v. Loog, 502.  
 Sisson v. Giles, 191.  
 Skinner v. Dayton, 430.  
 — v. M'Donnall, 461.  
 — v. Judson, 509.  
 Slater's Trusts, 409.  
 Sleech's Case, 451.  
 Slim v. Croucher, 386, 412, 492.  
 Slocombe v. Glubb, 344.  
 Slocum v. Slocum, 179.  
 Sloman v. Walter, 309.  
 Smart v. Hunt, 286.  
 Smith, *Ex parte*, 307.  
 — v. Ashton, 362.  
 — v. Bell, 101.  
 — v. Bromley, 401.  
 — v. Bruning, 399.  
 — v. Casen, 164.  
 — v. Claxton, 179, 182, 185, 186.  
 — v. Clay, 43.  
 — v. Garland, 85.  
 — v. Hill, 285.  
 — v. Hudson, 466.  
 — v. Jeyes, 431.  
 — v. Kay, 403.  
 — v. Lampton, 168.  
 — v. Leveaux, 439.  
 — v. Lyne, 217.  
 — v. Manning, 283.  
 — v. Mules, 431.  
 — v. Smith, 503.  
 — v. Wheatcroft, 472.  
 Smith, Fleming, & Co., *In re*, 451.  
 Sneed v. Sneed, 362.  
 Sneesby v. Thorne, 479.  
 Snell, *In re*, 305.  
 Snellgrove v. Baily, 162-164.  
 Snellgrove v. Snellgrove, 212.  
 Soar v. Foster, 119-120.  
 Sobey v. Sobey, 526.  
 Sohier v. Eldridge, 135.  
 Somerset v. Cookson, 468.  
 Somerville v. Mackay, 428.  
 Sopwith v. Maugham, 219.  
 South v. Bloxam, 268.  
 South Wales Railway Company v. Wythes, 454.  
 Sowden v. Sowden, 224-46.  
 Sparrow v. Josselyn, 168.  
 — v. Paris, 313.  
 Spencer v. Clarke, 22, 300-38.  
 —, Earl v. Peek, 511.  
 — v. Topham, 38, 405.  
 Spence, *Re*, 348.  
 Spirett v. Willows, 82-83.  
 Sproule v. Prior, 271.  
 Spurgeon v. Collier, 87-154.  
 Squib v. Wyn, 91.  
 Stackhouse v. Jersey (Countess), 24.  
 Stackpoole v. Stackpoole, 89.  
 Stafford v. Fiddon, 156.  
 Staniland v. Willott, 158.  
 Stanley v. Stanley, 156, 323.  
 Stead v. Hardaker, 260.  
 — v. Mellor, 104.  
 — v. Nelson, 322.  
 Stebbing v. Walkey, 379.  
 Steed v. Frece, 182.  
 Steedman v. Poole, 337.  
 Steel v. Steel, 320.  
 Stephens, *Ex parte*, 447.  
 — v. Stephens, 214.  
 Stephenson v. Chiswell, 435.  
 — v. Dowson, 167.  
 Stevens v. Bagwell, 96.  
 Steward v. Blakeway, 434.  
 Steward v. Winter, 458.  
 St. George v. Wake, 344.  
 St. John v. St. John, 401, 519.  
 — v. Wareham, 280.  
 Stocken v. Stocken, 246.  
 — v. Oil Co. 477.  
 Stockton Iron Furnace Company, *In re* 286.  
 Stone v. Lidderdale, 96.  
 Stonehewer v. Thomson, 284.  
 Stowell v. Robinson, 477.  
 Strange v. Fooks, 43, 425.  
 Stratford v. Powell, 219.  
 Strathmore v. Bowes, 343-345.  
 Stratton v. Best, 217.  
 Streetfield v. Streetfield, 65 2 7 220.  
 Street v. Rigby, 429.  
 Strickland v. Aldridge, 105.  
 Strong v. National Bank, 302.  
 Strong v. Williams, 281-232.  
 Stuart v. Kirkwall, 328.  
 Stubb v. Lee, 370.  
 Sturge v. Starr, 32.  
 — v. Sturge, 372.  
 — v. Midland, 465.  
 Sturgis v. Champneys, 341-47.  
 — v. Corp, 322.  
 Suisse v. Lowther, 238.  
 Sullivan v. Jacob, 479.  
 Summers v. Bean, 458.  
 Sumner v. Powell, 377, 419.  
 Surcombe v. Pinniger, 465, 466.  
 Swain v. Wall, 422.  
 Sweetapple v. Bindon, 66.  
 Swinfen v. Swinfen, 142.

## T.

- Tabor v. Brooks, 143.  
 Talbot v. Frere, 264.  
 — v. Hamilton, 469.  
 — v. Shrewsbury, 231.  
 — v. Staniforth, 410.  
 Tapley v. Kent, 189.  
 Tarsey's Trusts, *Re*, 321.  
 Tait v. Gilbert, 159-164.  
 — v. Leithhead, 164.  
 Taylor v. Brown, 478.  
 — v. Coenen, 83.  
 — v. Guest, 386.  
 — v. Hunter, 128.  
 — v. Johnston, 178.  
 — v. Haygarth, 124.  
 — v. Hunter, 128.  
 — v. Meads, 822.  
 — v. Plumer, 225.

Taylor v. Pugh, 344.  
 — v. Salmon, 407.  
 — v. Taylor (3 De G. M. & G. 190), 149, 188.  
 Teasdale v. Braithwaite, 87.  
 — v. Teasdale, 411.  
 Tenant v. Story, 321.  
 Thetford School Case, The, 118.  
 Thomas v. Britnel, 255.  
 — v. Dering, 477.  
 Thompson v. Bennet, 253.  
 — v. Finch, 149.  
 — v. Fisher, 69.  
 — v. Hudson, 449.  
 — v. Simpson, 381.  
 — v. Stanhope, 501.  
 — v. Whitmore, 378.  
 Thomson v. Thomson, 453.  
 Thorley's Cattle Food Company v. Massam, 487.  
 Thornbrough v. Baker, 136.  
 Thorndyke v. Hunt, 23.  
 Thornecroft v. Crockett, 268.  
 Thornton v. Hawley, 171.  
 Thynne v. Glengall, 243, 245.  
 Tibbets v. Tibbets, 220.  
 Tidd v. Lister, 268.  
 Tierney v. Wood, 77.  
 Tift v. Porter, 167.  
 Tildesley v. Clarkson, 479.  
 Tillinghast v. Wheaton, 162.  
 — v. Coggeshall, 62.  
 Timms v. Shannon, 283.  
 Tipping v. Tipping, 290.  
 Todd v. Wilson, 442.  
 Tollett v. Tollett, 363.  
 Tombs v. Roch, 261, 272.  
 Tomkins v. Colthurst, 262, 271.  
 Tomson v. Judge, 403.  
 Tongue v. Nutwell, 211.  
 Torr's Estate, 267.  
 Toulmin v. Steere, 291.  
 Toussain v. Martinait, 420.  
 Tower v. Rouse, 259.  
 Townend v. Townend, 145.  
 Townley v. Bedwell, 175.  
 Townley v. Sherborne, 147.  
 Townsend v. Westacott, 84.  
 Townshend v. Stangroom, 375, 472.  
 — v. Townshend, 254.  
 — v. Windham, 270.  
 Trafford v. Boehm, 197.  
 Travis v. Milne, 160.  
 Treadwell v. Brown, 435.  
 Tremain's Case, 319.  
 Trench v. Harrison, 225.  
 Trenton v. Makelway, 485.  
 Tress v. Savage, 480.  
 Trethewy v. Helyar, 260.  
 Trevor v. Trevor, 65.  
 Trimmer v. Danby, 162.  
 Trimm v. Marsh, 136.  
 Triquet v. Thornton, 192.  
 Trowell v. Shenton, 87, 466.  
 Tucker v. Burrow, 119.  
 Tudor v. Anson, 362.  
 Tuer v. Turner, 195.  
 Tullett v. Armstrong, 318, 333.  
 Tumbridge v. Care, 120.  
 Turner v. Corney, 141.  
 — v. Harvey, 368.  
 — v. Letts, 306.  
 — v. Marriott, 133.  
 Turton v. Benson, 94.  
 Tussaud v. Tussaud, 243.  
 Tweedale v. Tweedale, 106.  
 Twiss v. Massey, 435.  
 Tyler v. Lake, 321.  
 — v. Yates, 484.  
 Tyrrell v. Bank of London, 405, 407.

Tyrrell v. Hope, 320.

## U.

UNDERHILL v. Horwood, 376.  
 Ungley v. Ungley, 465.  
 Usticke v. Peters, 216.

## V.

Van v. Corpe, 474.  
 Van Piper v. Van Piper, 233.  
 Vanderzee v. Willis, 301.  
 Vane v. Barnard, 494.  
 — v. Vane, 351, 387.  
 Vaughan v. Barclay, 47.  
 — v. Halliday, 451.  
 — v. Vanderstegen, 267, 326, 327, 330.  
 — v. Welsh, 486.  
 Veal v. Veal, 164.  
 Verity v. Wyld, 306.  
 Verney v. Carding, 155.  
 Vickers v. Pound, 168.  
 Villa v. Rodriguez, 280.  
 Vigers v. Pike, 388.  
 Vulliamy v. Noble, 448.

## W.

W—— v. B——, 518.  
 Wadsworth v. Wendell, 70.  
 Wagstaff v. Smith, 320, 322.  
 Wake v. Wake, 218.  
 Walcot v. Walker, 498.  
 Waldron v. Sloper, 298.  
 Walford v. Gray, 467.  
 Walker v. Jeffreys, 479.  
 — v. Meager, 257.  
 — v. Mickethwaite, 487.  
 — v. Preswick, 130.  
 — v. Symonds, 149, 150, 389.  
 Wall v. Colshed, 184.  
 Wallis v. Duke of Portland, 97.  
 Wallwyn v. Lee, 28.  
 Walmsley v. Child, 358.  
 Walsham v. Stanton, 407.  
 Walter v. Seife, 497.  
 Walwyn v. Coutts, 89.  
 Ward v. Arch, 171.  
 — v. Lewis, 90.  
 — v. Peloubet, 100.  
 — v. Turner, 158, 162.  
 Warden v. Jones, 87, 465, 466.  
 Ware v. Egmont, 38.  
 — v. Horwood, 487.  
 Waring, *Ex parte*, 451.  
 Warley v. Warley, 260.  
 Warneferd v. Thomson, 363.  
 Warner v. Bates, 100.  
 Warren v. Rudall, 205.  
 Warriner v. Rodgers, 81.  
 Waterer v. Waterer, 434.  
 Waters v. Taylor, 431, 432.  
 Wathen v. Smith, 233.  
 Watney v. Wells, 432.  
 Watson v. Alcock, 426.  
 — v. Knight, 90.  
 — v. Marston, 479.  
 — v. Rodwell, 157, 442.  
 — v. Rose, 133.  
 — v. Watson, 245.  
 Watt v. Watt, 362.  
 Watts v. Bullas, 362.  
 Way v. East, 106.  
 Way's Settlement, *Re*, 80.  
 Webb v. Earl of Shaftesbury, 144.  
 — v. Hewitt, 424, 425.  
 — v. Rorke, 290.

- Webster *v.* Petre, 423.  
 Wedderburn *v.* Wedderburn, 145, 433.  
 Wedgwood *v.* Adams, 479.  
 Weed *v.* Small, 440.  
 Weeding *v.* Weeding, 176, 178.  
 Welby *v.* Welby, 214.  
 Weldon *v.* Dicks, 500.  
 Welles *v.* Middleton, 405, 406.  
 Wellesley *v.* Beaufort, 346, 348, 349.  
 — *v.* Mornington, 413.  
 West *v.* Erisey, 377.  
 — *v.* West, 331.  
 Westby *v.* Westby, 371.  
 Western Bank of Scotland *v.* Addie, 387.  
 Westley *v.* Clarke, 150.  
 Wheeler *v.* Smith, 118.  
 — *v.* Warner, 106.  
 Wheldale *v.* Partridge, 188, 195, 197, 200.  
 Whistler *v.* Webster, 203, 206, 208.  
 Whitbread *v.* Jordan, 38.  
 — *v.* Smith, 295.  
 Whitechurch *v.* Bevis, 462.  
 White *v.* Nuts, 366.  
 White *v.* Williams, 128.  
 Whitfield *v.* Hiles, 349.  
 — *v.* Fausset, 356, 359.  
 Whiting *v.* Burke, 420.  
 Whitten *v.* Whitten, 119.  
 Whitting, *In re*, 92.  
 Whitton *v.* Russell, 366.  
 Whyte *v.* Whyte, 236.  
 Wigg *v.* Wigg, 154.  
 Wilbanks *v.* Wilbanks, 202, 205.  
 Wilcocks *v.* Wilcocks, 223.  
 Wilcox *v.* Wilcox, 348, 434.  
 Wildman *v.* Wildman, 316.  
 Wild's Case, 66.  
 Wilkes *v.* Holmes, 362.  
 Wilkin *v.* Aikin, 500.  
 Wilkinson *v.* Nelson, 378.  
 Wilkinson *v.* Parry, 156.  
 — *v.* Wilkinson, 70.  
 Wilan *v.* Wilan, 369, 370.  
 Willard *v.* Taylor, 42.  
 Willock *v.* Terrell, 96.  
 Willett *v.* Blanford, 145, 433.  
 Williams, *Ex parte*, 286.  
 Williams, *In re*, 111.  
 — *v.* Bull, 516.  
 — *v.* Davies, 446.  
 — *v.* Jordani, 480.  
 — *v.* Kershaw, 114.  
 — *v.* Lambe, 31.  
 — *v.* Nixon, 149.  
 — *v.* Owens, 280.  
 — *v.* Stratton, 297.  
 — *v.* Williams, 121, 122.  
 Willman *v.* Holuris, 320.  
 Willis *v.* Kymer, 108.  
 Wills *v.* Stradling, 463.  
 — *v.* Slade, 505.  
 Wilson, *Ex parte*, 286, 435.  
 Wilson *v.* Lloyd, 420.  
 — *v.* Piggott, 414.  
 — *v.* Townshend, 217.  
 — *v.* Williams, 477.  
 Wing *v.* Cooper, 280.  
 Winn *v.* Bull, 480.  
 Wintour *v.* Clifton, 215.  
 Wistar's Appeal, 143.  
 Withrington *v.* Banks, 291, 495.  
 Withers *v.* Withers, 59.  
 — *v.* Yeadon, 363.  
 Withy *v.* Cottle, 479.  
 Witt, *In re*, 305.  
 Wollaston *v.* King, 209.  
 — *v.* Tribe, 413, 507.  
 Wolverhampton R. *v.* L. *v.* N. W. Railway, 490.  
 Wood *v.* Bryant, 246.  
 — *v.* Ordish, 260.  
 — *v.* Rowcliffe, 459.  
 — *v.* Sutcliffe, 496.  
 Woodmeston *v.* Walker, 335.  
 Woods *v.* Hyde, 178.  
 Wooleridge *v.* Norris, 420.  
 Wooliam *v.* Hearn, 472.  
 Woolridge *v.* Woolridge, 209.  
 Worrall *v.* Harford, 151.  
 — *v.* Jacob, 368.  
 Worrall's Appeal, 152.  
 Worthington *v.* Morgan, 38.  
 Wray *v.* Steele, 117.  
 Wrigley *v.* Swainson, 344.  
 Wright, *Ex parte*, 296.  
 — *v.* Howard, 475.  
 — *v.* Hunter, 436.  
 — *v.* Lambert, 153.  
 — *v.* Laing, 449.  
 — *v.* Maidstone, 361.  
 — *v.* Pucket, 462.  
 — *v.* Rose, 173.  
 — *v.* Simpson, 423, 419.  
 — *v.* Snowe, 156.  
 — *v.* Vanderplank, 43, 402, 403.  
 — *v.* Wright, 184, 324, 336.  
 Wyke *v.* Rogers, 424.  
 Wylie *v.* Wylie, 434.  
 Wylie *v.* Pollen, 40.  
 Wynstanley *v.* Lee, 497.  
 Wythe *v.* Henniker, 272.  
 Wythes *v.* Labouchere, 417.  
 — *v.* Lee, 133.

Y.

- YALLOP, *Ex parte*, 118.  
 Yeatman *v.* Yeatman, 165.  
 Yem *v.* Edwards, 133.  
 Iglesias, *In re*, 451.  
 Yockney *v.* Hansard, 235.  
 York, Mayor of, *v.* Pilkington, 437, 514.  
 York Union Banking Company *v.* Astley, 237.  
 Young *v.* English, 306, 449.

# THE PRINCIPLES OF EQUITY.

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## PART I.—INTRODUCTORY.

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### CHAPTER I.

#### THE JURISDICTION IN EQUITY.

In treating of Equity, it is essential to distinguish the various senses in which that word is used. Nature and character of the jurisdiction in equity. In its most general sense, we are accustomed to call that equity which in the transactions of mankind is founded in natural justice, or in honesty and right, and which properly arises *ex æquo et bono*. But it would be a great mistake to suppose that equity, as administered in the courts, embraces a jurisdiction so wide and various as the principles of natural justice. There are, on the contrary, many matters of natural justice which the courts leave wholly unprovided for, from the difficulty of framing any general rules to meet them, and from the doubtful policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness. A large portion, therefore, of natural equity, in its widest sense, cannot

be, at least, is not, judicially enforced, but must be, or at least, is in fact, left to the conscience of private individuals. <sup>1</sup>

Definition of equity,—by reference to its province or extent, and not its content.

Are we then to infer that the equity of the Court of Chancery represents the enforceable residue of natural equity, or, to put the matter more accurately, the whole of that portion of natural equity which may be, and which, in fact, is enforced by legal sanctions, as administered by the equity tribunals? Were we to arrive at that conclusion, we should not be far wrong, bearing in mind, however, not to ignore the claims of the common law and the statute law. The customary use of the term common law, it is true, contradistinguishes it from equity strictly so called; nevertheless, the common law is as much founded on natural justice and good conscience as equity is; and if the common law has, until recently, fallen short of equity in its operation, its failure is to be attributed to defects in the *mode of administering* its principles, rather than to any inherent weakness of or deficiency in the principles themselves. And, again, the enactments of the legislature <sup>2</sup> embody and give legal sanction to many principles of natural equity which though capable of being administered by the courts, had been omitted to be recognized as such, an omission arising probably from the tendency of all institutions to assume a defined and stereotypic form which refuses to receive further accessions, or to admit of alterations, even though coming from a cognate source. Having thus mapped out the whole area of what is termed natural justice, and so having seen that a large portion of it cannot be, or, in fact, is not, enforced at all by any civil tribunals, and that another large portion of it is enforced in the Com-

<sup>1</sup> Green v. Lyon, 21 W. R. 830.

<sup>2</sup> Maine's Ancient Law, 29.

mon Law divisions, and a third part of it is enforced in the Common Law and in the Equity divisions indifferently, by virtue of legislative enactments, we are in a position to indicate, approximately, the province of equity strictly and properly so called. For, putting aside all that part of natural equity that is sanctioned and enforced by or by virtue of legislative enactments, equity may then be defined as being that portion of natural justice which, though of such a nature as properly to admit of being judicially enforced, was, from circumstances hereafter to be noticed, omitted to be enforced by the Common Law divisions, and which the Chancery division, or Court of Chancery, for reasons of its own, enforced. In short, the whole distinction between equity and law may be said to be a matter not so much of substance or of principle as of form and history.

Definition of equity.

Before proceeding further, the student must endeavor to understand, with their proper limitations, the vague and inaccurate definitions or rather descriptions of equity, with which the text writers (chiefly the earlier ones) abound. Thus, one writer says that it is the duty of equity "to correct or mitigate the rigor, and what in a proper sense may be termed the injustice of the common law." Another holds that "equity is a judicial interpretation of laws, which, pre-supposing the Legislature to have intended what is just and right, pursues and effectuates that intention." Again, Lord Bacon lays it down, "*Habeant similiter Curiae Prætorie potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis.*" And on the solemn occasion of his accepting the office of Chancellor, he said that Chancery was ordained to supply the law, not to subvert the law.

The older definitions of equity stated.

All these definitions of equity are good (at least as descriptions of equity), so far as they go. In

The older definitions of equity explained.

the early history of English equity jurisprudence, there was probably much to justify them. The courts of equity were, it is probable, not then bounded in all cases by definite rules, but acted on principles of good conscience and natural justice without much restraint of any sort. In fact, it is not easy to see how the courts of equity could do otherwise in those early times when no definite rules had as yet been made or settled; and if the early Chancellors had not assumed to themselves (as representing the Sovereign and fountain of justice) the necessary powers, the English equity system would (and in fact, could) never have acquired its present dignity and influence for good, or even have come into existence at all.

Equity in modern times,—character of: I. Courts of equity bound by settled rules and precedents,

But however indefinite may have been the functions of equity in its origin, there can be no doubt that the definitions or descriptions cited above do not express the extent or character of equity at the present day. They would, in fact, mislead as definitions, and be inaccurate as descriptions of modern equity. For a court of equity is now bound by settled rules as completely as a court of common law. “There are certain principles on which courts of equity act which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of common law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus enlarge the operation of those principles, but the principles are as fixed and certain as the principles on which the courts of common law proceed.”<sup>1</sup> Again, Blackstone says, “The system of our courts of equity is a labored connected system, governed by established rules,

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<sup>1</sup> Bond v. Hopkins, 1 Sch. & Lef. 428, 429.



and bound down by precedents from which they do not depart.”<sup>1</sup> Again, it is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound by, and equally profess to interpret laws according to, the true intent of the legislature. There is not a single rule of interpreting laws that is not equally used by the judges in both the common law and the equity divisions; in fact, so far as the interpretation of laws is a question merely of construing enactments of the legislature, the construction in all the divisions is necessarily the same. Each division endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single letter.<sup>2</sup> In all the divisions, the distinction taken in Mr. Austin’s Jurisprudence, between the *ratio legis* (*i. e.*, the principle of a statute) and the *ratio decidendi* (*i. e.*, the principle of a decided case), is strictly observed and acted upon, that is to say, both in the common law and in the equity divisions, the *ratio decidendi* alone is considered of weight in interpreting and in applying decided cases; and in all the divisions equally, if the words of the statute are clear, they alone are regarded, and the *ratio legis* receives no weight at all, but is considered (for whatever weight it has), together with other *indicia* of interpretation, if (and only if) the words of the statute in themselves are not clear.<sup>3</sup> And, in fact, to indicate in a few words the distinction between modern equity and common law, it may be said, in the words again of Blackstone, that “the systems of jurisprudence in our courts, both of law and of

<sup>1</sup> 3 Black. Com. 432.

<sup>2</sup> 3 Black. Com. 431.

<sup>3</sup> Heydon’s case, 3 Rep. 7; Dwarries on Statutes, 2d ed., 563.

<sup>2</sup> Modes of interpreting laws the same in equity as at law.

equity, are *now* equally artificial systems, founded on the same principles of justice and positive law ; but varied by different usages in the *forms* or *modes* of *their proceedings* ;”<sup>1</sup> and (it may be added) that since the Judicature Acts, 1873-76, the forms and modes of their proceedings even are hardly different, excepting so far as the diversities of the subject-matters, and of the relief adapted thereto, involve or carry with them a greater or less diversity of form or of procedure.

Having thus briefly indicated the nature and the province of equity, it remains to trace the origin of the distinction in England between common law and equity,—a distinction which is not without its parallel in the systems of jurisprudence of America and of other countries also.

Origin of the jurisdiction in equity.

It is a well-known fact that, during the Anglo-Saxon and early Norman periods of English history, the principles of the civil law were familiar to the clergy, the great repositories of learning in early times ; and that the clergy being in those days the expounders and administrators of the law, imported into their decisions or expositions of it, many of the principles, and much also of the practice, of the Roman law.<sup>2</sup> And early in the twelfth century, shortly after the discovery of the Pandects, schools for the study of the Roman, *i. e.*, civil law, were established in England, *e. g.*, the school of Irnerius at Oxford. The familiar study of the civil law would, but for the untoward circumstances hereinafter mentioned, have gone far to obviate the necessity for any distinction between the jurisdictions of equity and of common law in England, and in this precise way, *viz.* : The Roman law itself had from natural causes developed in the course of its

<sup>1</sup> 3 Black. Com. 434.

<sup>2</sup> 1 Spence Eq. 16.

history the like distinction, and had afterwards invented and effectively applied a method for abolishing, and had in fact abolished, the distinction. So that the English law had merely to receive instruction from the Roman law, in order to forestall the growth of the distinction; but various circumstances have from time to time operated to prevent, and have prevented, the complete incorporation of the principles and practice of the Roman law into the English law. And in point of fact, the English law, it will be found, probably from being left to its own natural genius, has pursued a course remarkably analagous to the Roman law in its historical development, that is to say, it first developed the distinction between law and equity, and it has eventually invented and successfully applied a method for abolishing the distinction,—in the common fusion of the two.

1. It has always been held, that the principles of the common law are founded in reason and equity; and so long as the common law was in the course of its formation, it was capable—as indeed it has ever continued to be to some extent—not only of being extended to cases not expressly provided for by, but falling within the spirit of, the existing law, but also of having the principles of equity applied by the judges in their decisions, as circumstances arose which called for the application of such principles. But in course of time, and at a very early time, the common law completed its development, like a girl does her education; precedents were established by the judges, and were considered binding on succeeding judges; and it became difficult (and in numerous instances impossible) to make new precedents without interfering with those which had already been established. Hence, though new precedents have ever continued to be made, the common law became to a great ex-

Reasons of separation between the two systems, —common law and equity.

1. The common law became a *jus strictum* rather early.

tent a *jus strictum* i. e., a system positive and inflexible, too early; and the rules of justice could not (or, at all events, would not and did not) accommodate themselves to the exigencies of new circumstances and new cases.<sup>1</sup>

<sup>2</sup> The Roman law was deprived of authority in the courts.

2. The Roman law, on the other hand, was incapable of universal application; *e. g.*, the laws governing the tenure of land in England were founded on feudal principles, and involved distinctions, which, although not altogether alien to the doctrines of the Roman law, were most inadequately expressed therein. Moreover, the Roman law, even in its limited applicability to England, received from temporary and regrettable occasions a severe and lasting check in England. For it appears, judging at least from the current histories, that in the reign of Edward III. the court of Rome had become odious to the English king and people; and that an almost general dislike, on the part of the laity at least, to everything connected with the Holy See had begun to spring up. The very name of the Roman law became (it is alleged) the object of aversion. And in the next following reign of Richard II., the barons protested that they never would suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited (at least, as of authority) in the common law tribunals.<sup>2</sup>

This discountenancing and general discouragement of the Roman law operated, of course, to aggravate the already positive and inflexible character of the common law. And this inflexibility was still further aggravated and perpetuated (at least, for centuries) by the next following cause of the separation between law and equity.

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<sup>1</sup> 1 Spence Eq. 321, 322.

<sup>2</sup> *Id.* 346.

3. Notwithstanding the obstacles aforesaid, the courts of common law might have become much more useful than they in fact did, had they not adopted an inflexible, inelastic, and cramping system of procedure. To the adoption of this inflexible procedure may be proximately attributed, though concurrently with the other causes noticed above, the eventual rise and rapid progress of the Court of Chancery as a separate jurisdiction.

3. The system of procedure at common law was even more inflexible than the principles themselves of the common law.

According to the common law every species of civil wrong was supposed to fall within some particular class, and for every such class of wrong an appropriate remedy existed. The remedy in question assumed the form of a *writ* or *BREVE*; and the writ or *breve* was the first step in every action. Thus, if a man had suffered an injury, it was not competent for him to bring to the notice of a court of law the facts of the case in a simple and natural manner by merely stating them, leaving the court to say whether upon the facts stated the case was one deserving of redress; but he had first to determine within what class of wrong his case fell, and then to apply for the appropriate remedy or writ. The evil effects of this system of procedure showed themselves in a twofold way.

(a.) Even where the facts were such as to bring the alleged wrong within some one of the classes recognized at common law, the suitor was exposed to the risk of selecting an improper writ, and merely on that account failing in his action. This technical stumbling *in limine*, although from time to time relieved by subsequent legislation, continued to be a fertile source of injustice until the Common Law Procedure Act of 1852 (15 and 16 Vict., cap. 76), sec. 3, enacted that it should not be necessary for a plaintiff to mention any form of action in his writ of summons.<sup>1</sup>

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<sup>1</sup> Sharrod v. N. W. R. Co., 4 Ex. Rep. 580.

(b.) Another evil of the then system of procedure was, that if the alleged wrong did not fall within any recognized class of writ, the plaintiff was absolutely without any remedy at all. The writ was inflexible and not capable of adaptation. This second evil appears to have been very early felt; for in the 13 Edw. I. a remedy was attempted for it.

4. "The statute in Consimili Casu,"  
—attempted a  
remedy but failed

4. At that time the writ for commencing actions at law was an original writ issuing out of the Chancery, and the drawing up of the writ was a part of the business of the clerks in Chancery. The remedy that was attempted was to give a larger discretion to the clerks in Chancery in the framing of the writ. It was accordingly enacted by the 13 Edw. I. stat. 1, cap. 24, that "whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case falling under like law and requiring like remedy none is found, the clerks of the Chancery shall agree in making the writ, or the plaintiff may adjourn it until the next Parliament; and the cases in which the clerks cannot agree are to be written and referred by them unto the next Parliament, and by agreement of men learned in the law a writ is to be made, lest it should happen that the court should long time fail to minister justice unto complainant."

This enactment which is commonly called "The Statute in Consimili Casu," proved wholly inadequate to meet the evil complained of, and that for the two following reasons, viz: —

(aa.) The judges of the common law courts assumed, and very properly assumed, a discretionary jurisdiction to decide on the validity of the writs as adapted by the clerks in Chancery.<sup>1</sup> Probably many of the adaptations were both clumsy

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<sup>1</sup> 1 Spencer Equity, 325.

and impractical, and so lengthy and verbose as to render the writ or *breve* a misnomer. Anyhow, the common law judges refused to recognize them in very many instances.

(*bb.*) The progress of society and of civilization, by giving rise to novel and unusual circumstances, increased the difficulty which the clerks in Chancery experienced in adapting new cases to old forms; and, no doubt, their well meant but ineffective efforts only further aggravated the judges of the courts of common law. This occasion of difficulty was of course destined also to go on increasing. And further, in addition to new forms of *action*, new forms of *defence* also arose, for which no provision had been made,<sup>1</sup> and which necessarily therefore fell beyond the jurisdiction of the common law.<sup>2</sup>

5. When the common law judges could not or would not grant relief, the only course open to suitors was to petition the king in Parliament or in council; the sovereign in those troubled times, seldom without a foreign war or a rebellion at home to engage his whole attention, generally referred the matter to the "keeper of his conscience," the Chancellor; and finally in the reign of Edward III., the Chancellor came to be recognized as a permanent judge, and the Court of Chancery as a permanent jurisdiction distinct from the judges and the courts of the common law empowered to give relief in cases which required extraordinary relief. The last-mentioned king, in the twenty-second year of his reign by an ordinance referred all such matters as were "of grace" to the Chancellor or keeper of the Great Seal;<sup>3</sup> and from that time, suits by

5. The Lord Chancellor, by direction of the Sovereign and of Parliament, personally intervened, at length, in 22 Edw. III.

Ordinance of 22 Edw. III., as to matters "of grace."

<sup>1</sup> 1 Spencer Equity, 325.

<sup>2</sup> See 17 & 18 Vict., c. 125, s. 83.

<sup>3</sup> 1 Spencer Equity, 337.

petition or bill, without any preliminary writ, became the common course of procedure before the Chancellor, *i. e.*, in the Court of Chancery. On this bill or petition being presented, it was at once looked into by the Chancellor, and if the Chancellor thought that the case called for extraordinary relief, a writ called a writ of *supœna* was issued by command of the Chancellor in the name of the king *summoning the defendant to appear before the Chancery to answer the complaint, and to abide by the order of the court.* The personal examination of the bill or petition by the Chancellor was afterwards dispensed with, the signature of counsel to the bill or petition being accepted as a guarantee that the case was a proper one, sufficient to authorize the immediate issue of the writ of *supœna*.<sup>1</sup>

Fusion of law and equity in England.

[In the year 1873, a great change in this respect took place in England; the spectacle of two courts administering different rules came to an end, and law and equity were in substance and effect fused into one system, and a uniform system of procedure in the Chancery divisions and the Common Law divisions was established. By this act called "The Supreme Court of Judicature Act,"<sup>2</sup> it was enacted that in every civil cause or matter, law and equity shall be administered concurrently, and that in all matters not particularly mentioned in the act where there is any conflict or variance between the rules of equity and the rules of the common law, the rules of equity shall prevail.

In the United States.

The principles of the English Court of Chancery were early adopted in all of the United States. But America antedated England in reforming the machinery to enforce them. In a large number of the States, the distinction between legal and equitable

<sup>1</sup> Langdell's Summary of Equity Pleading.

<sup>2</sup> 36 and 37 Vic. c. 66.



forms of action has been abolished, and a general form of civil action substituted in their place.<sup>1]</sup>

From the preceding historical *resume*, it will be seen that (as already hinted) the English Law has followed, in the history of its development, in the lines that the Roman Law pursued, or in like lines thereto,—first inventing the distinction between law and equity, and then inventing a means of abolishing the distinction. And let no one imagine that what two such nations as the Roman and the English have found cause to do, in respect either of the distinction itself or of the abolition thereof, has been or is either causeless or anomalous.

[It will have been observed, that the subjects of chancery jurisdiction may be very well divided into three general divisions, the *exclusive*, the *concurrent* and the *auxiliary* jurisdiction. Three divisions of equity jurisdiction.]

The *original* jurisdiction (as the foregoing history 1. Original. of the origin of the English Court of Chancery will have made plain,) covered all those cases where there were particular rights capable of being judicially enforced, but for which no forms of action were available at law.

The *concurrent* jurisdiction (concurrent that is 2. Concurrent. with the courts of law) covered all cases where the law did not afford *adequate* relief, or where no, or no complete, relief could be obtained at law except by circuity of action, or by multiplicity of suits,

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[<sup>1</sup> In Alabama, Delaware, Kentucky, Maryland, Mississippi, New Jersey and Tennessee, distinct Courts of Chancery exist. In Arkansas, Connecticut, Georgia, Florida, Illinois, Iowa, Maine, Massachusetts, Michigan, New Hampshire, North Carolina, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Virginia. West Virginia and the Federal Courts, the powers of a Chancellor are exercised by the judges of the Common Law Courts. according to the practice of the Court of Chancery. In all the other States, the distinction between actions at law and suits in equity, has been abolished as stated above.]

and adequate and complete relief could be given in equity in one and the same action, as in the cases of accident, mistake, fraud, specific performance, and the like.

3. Auxiliary.

Although equity had no substantive jurisdiction] in any of those cases in which the matter was exclusively cognisable at law; yet if the courts of law, from any deficiency in their machinery, or defects in their procedure, were unable (as often happened) to procure that evidence which a court of equity could obtain by its more flexible and searching system of examination, then in every of such cases equity interposed its jurisdiction in aid of the courts of common law by providing such necessary evidence, unless restrained from doing so by equitable considerations of its own. On the other hand, where the courts of law could always afford adequate relief without the aid of equity and without circuitry of action or multiplicity of suits, and could also take due care of the matter of evidence, and generally of the rights of all parties interested in the suit, equity had no jurisdiction. And in the proportion that the jurisdiction of equity in aid merely of the common law became (as it gradually did) less and less necessary,—the courts of common law becoming in the meantime more and more competent in themselves,—so in the like proportion the jurisdiction of equity “in aid,” and which was thence called the “auxiliary” jurisdiction, grew more and more into disuse.

## CHAPTER II.

## THE MAXIMS OF EQUITY.

EQUITY is pre-eminently a science ; and like geometry or any other science, it starts with and assumes certain maxims, which are supposed to embody and to express the fundamental notions of the science. A common element of equity pervades each of the maxims, which sometimes gives them the appearance of running into each other ; but with a little practice they are readily distinguishable ; and it is highly necessary to keep the distinctions between them clear. Each maxim, therefore, both merits and requires a separate treatment,—as well a separate exposition as also a separate illustration of it. The maxims peculiar to equity are the following :

1. Equity will not, by reason of a merely technical defect, suffer a wrong to be without a remedy. Maxims of equity

2. Equity follows the law, — *Æquitas sequitur legem*.

3. Where there are equal equities, the first in time shall prevail.

4. Where there is equal equity, the law must prevail.

5. He who seeks equity must do equity.

6. He who comes into equity must come with clean hands.

7. Delay defeats equities, — *Vigilantibus non dormientibus, æquitas subvenit*.

8. Equality is equity.

9. Equity looks to the intent rather than to the form.

10. Equity looks on that as done which ought to have been done, or which has been agreed or directed to be done.

11. Equity imputes an intention to fulfil an obligation.

[12. Equity acts *in personam*.

13. Equity acts specifically.]

1. Equity will not, by reason of a merely technical defect, suffer a wrong without a remedy.

1. *Equity will not, by reason of a merely technical defect, suffer a wrong to be without a remedy.*—

It will be evident that this maxim is at the foundation of a large proportion of equity jurisprudence, so far as that jurisprudence aims at supplying the defects which at one time existed in the common law. For example, in the case of an outstanding dry legal term, prior in date to the plaintiff's title to an estate,—and which term, although a merely technical objection, would at law have prevented the plaintiff from recovering in ejectment,—the court of equity interposed to put the term out of the plaintiff's way, and even permitted him by means of an “ejectment-bill,” as it was called, to recover the very possession of the land itself without regard to the term. Similarly, in the case of a mortgagor seeking to recover an estate or rent, the fact of the legal estate being in the mortgagee was no impediment in equity. The maxim must, however, be understood with the following limitations,—it must be understood as referring to rights which come within a class enforceable at law, or capable of being judicially enforced, and the enforcement of which would not occasion a greater detriment or inconvenience to the public than would result from leaving them to be disposed of *in foro conscientiæ*; and it must also be understood as referring to cases where there is no equal or superior adverse right or

adverse equity in the private individual who is made defendant; and to cases where the plaintiff who is remediless at law has not lost his remedy there by his own conduct or default. And it must also be remembered, that many real wrongs are not remediable at all, either at law or in equity; and that a still larger class of apparent wrongs are not wrongs at all, excepting in the imagination of the suitor; of course, the maxim does not apply to such.<sup>1</sup>

2. *Equity follows the law.*—This maxim has two principal applications, viz:—

2. Equity follows the law.

(a.) In its concurrent jurisdiction, that is to say, as regards *legal* estates, rights, and interests, equity is strictly bound by the rules of law, and has no discretion to deviate from them.

(b.) In its exclusive jurisdiction (including for this purpose its auxiliary jurisdiction also), that is to say, as regards *equitable* estates, rights, and interests, equity, although not strictly speaking bound by the rules of law, yet acts in analogy to these rules, wherever an analogy exists.

But the maxim in both its applications must be taken with this limitation—that equity will suffer the rules of law to govern, and the course of law to proceed, in the absence, and only in the absence, of any circumstances which render it incumbent on a court of equity to interpose in accordance with the maxim previously mentioned, that equity will not suffer a wrong to be without a remedy.<sup>2</sup>

Limitations of the rule.

(a.) As an illustration of the first application of this maxim, [the English Court of Chancery] follows the law as to the rule of primogeniture, although that rule, in any particular instance in which it is so followed, may be productive of the greatest hardship towards all, or some, or one, of the

(a.) Concurrent jurisdiction: Primogeniture, and rules of descent generally.

[<sup>1</sup> Rees v. City of Watertown, 19 Wall. 121.]

<sup>2</sup> Smith's Man. 14, 15.

younger members of a family, by leaving them for example, without any sort of provision, while the eldest son may be in affluence. These accidental circumstances create no equitable right, or equity, in favor of the youngest son against the eldest, and do not demand the interposition of a court of equity. The mere absence or want of provision, a circumstance arising perhaps from the culpable neglect of the parent, can create no equity against the eldest son, who has a right to the descended or entailed estate, without any reference to the circumstances of the other members of the family. No relief could be given in such a case as that, without directly breaking through a rule of law, which a court of equity never does, and has no power to do.

Following the law, equity may at the same time avoid it in effect.

And where the circumstances are of a different kind, that is to say, are sufficient to create an equitable right, or equity, then even there a court of equity never does break through a rule of law, or refuse to recognize it, because it has no power and no discretion in the matter; but while recognizing the rule of law, and ever maintaining it, a court of equity will in a proper case get round about, avoid, or obviate it. For example, if an eldest son should prevent his father from executing a proposed will devising one estate to a younger brother, by promising to convey such estate to such younger brother, and that estate should accordingly descend at law to the eldest son, a court of equity would interpose and say,—“True it is, you (the eldest son) have the estate at law, in other words, the legal estate; that we don’t deny or interfere with; but precisely because you have it, you will make a convenient trustee of it for your younger brother, who (in our opinion) is equitably entitled to it.”

And again, in *Loffus v. Maw*,<sup>1</sup> a testator in advanced years and in ill health induced his niece to reside with him as his housekeeper, on the verbal representation that he would leave her certain property by his will, which he accordingly prepared and executed, but subsequently by a codicil revoked. The court directed that the trusts of the will in favor of the niece should be performed. It held, that in cases of this kind, a representation that property is to be given, even though by a revocable instrument, is binding where the person to whom the representation is made has acted upon the faith of it to his or her detriment; and that it is the law of the court, grounded on such detriment, that makes it binding; and that it does not matter that the represented mode of gift is of an essentially revocable character. There is here no setting aside of law: but there is the like avoiding of law as in the former case.

(b.) As an illustration of the second application of the maxim now being explained, it may be mentioned (but only briefly in this place, as the matter will be considered at proper length in the following chapter, upon Trusts), that in construing the words of limitation of trust estates in deeds and wills, at least where the trust estate is executed, and in some cases even where it is executory also, a court of equity follows the rule of law familiarly identified as the Rule in Shelley's case, and also observes all the other rules of law for the construction of the words of limitation of legal estates. But where the trust estate is executory only, and the court sees an intention to exclude the rules of law for the construction of the words of limitation, then, and in that case, the court carries out the intention in analogy to the rules of law, but not in

*Loffus v. Maw*,—  
instance of equity  
avoiding the law.

Exclusive jurisdiction: Words of limitation in deeds and wills,—trusts executed, and trusts executory.

<sup>1</sup> 3 Giff. 592. And see *Meluish v. Milton*, L. R. 3 Ch. Div. 27.

servile obedience to them, where such obedience would defeat the execution of the intention.

(a. and b.) Con-  
current and ex-  
clusive jurisdic-  
tions: The Stat-  
utes of Limita-  
tion.

(a and b.) As an illustration of the maxim in both of its applications, we may refer to the manner in which equity deals with the statutes of limitation for actions and suits. The old statutes of limitation were in their terms applicable to courts of law only; nevertheless, equity by analogy acted upon them, and refused relief under like circumstances. The rule of equity regarding the statutes of limitation may be stated (and, it is believed, with accuracy) thus,—that in its exclusive jurisdiction equity never exceeds, although for reasons of its own (such as laches, etc.), it often stops a long way short of or within the limit of time prescribed at law; and that, in its concurrent jurisdiction, equity never either exceeds or abridges the limit of time prescribed at law.<sup>1</sup> This exemplifies the two-fold operation of the maxim under discussion, equity in its concurrent jurisdiction being a slave to law, and in its exclusive jurisdiction being free (within the limits of law) to give weight to considerations of its own.

3. *Qui prior est  
tempore, potior est  
jure.*

3. *Qui prior est tempore, potior est jure.*—Where equities are equal, the first in time shall prevail. This maxim is often misunderstood. It has been understood by some as meaning, that as between persons having only equitable interests, *Qui prior est tempore, potior est jure*—but this proposition is far from being universally true. In fact, not only is it not universally true as between persons having only equitable interests, but it is not universally true even where the equitable interests are of precisely the same nature, and in that respect precisely equal; for example, in the common case of two successive assignments for valuable consideration of a

<sup>1</sup> *Fullwood v. Fullwood*, 9 Ch. Div. 176.



reversionary interest in stock standing in the names of trustees, if the second assignee has given notice to the trustee and the first has omitted to do so, the second assignee has priority over the first.<sup>1</sup> Another form of stating the rule is thus: "As between persons having only equitable interests, if their equities are equal, *Qui prior est tempore, potior est jure.*" This mode of stating the rule is not so obviously incorrect; yet, when examined, it is seen to involve a contradiction. For, when we talk of two persons having equal or unequal equities, in what sense do we use the word "equity?" For example, when we say that A. has a better equity than B., what is meant by that? It means only this—that according to those principles of right and justice which a court of equity recognises and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B.; and therefore it is impossible, strictly speaking, that two persons should have "equal equities," except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the "equities" of the two are equal; *i. e.*, in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? The rule may be correctly stated thus,—that, as between persons having only equitable interests, if such equities are in all other respects equal, *Qui prior est tempore, potior est jure*—that in a contest between persons having only equitable interests, priority of time is the ground of preference *last resorted to*; *i. e.*, that a court of equity will not prefer one to the other on

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<sup>1</sup> Loveridge v. Cooper, 3 Russ. 30.

the mere ground of priority of time, until it finds, on an examination of their relative merits, that there is no other sufficient ground of preference between them; or, in other words, that their equities are *in all other respects* equal; but if the one has on other grounds a better equity than the other, priority of time is immaterial.<sup>1</sup> A single case will for the present suffice to illustrate the application of this maxim. A., B., C., three vendors entitled in common to a piece of land, sold the land to D.; on the day for completion of the purchase, A., B., C., and D. all attended at the office of the vendors' solicitor, when D. paid A. and B. their respective shares of the purchase-money, but put off C. (who was a friend) until the day following, having promised C. faithfully to pay him his proportion of the purchase-money on that following morning. Then A. and B., and also C., executed the deed of conveyance to D., in which the payment of the *entire* purchase-money was acknowledged by A. and B., and also by C., and A. and B. and also C. severally also signed receipts indorsed on the deed of conveyance for their respective purchase moneys. Then C. very negligently and foolishly let D. take away the deed of conveyance (together with the other deeds) in his bag, although C. should have kept the deed and deeds at his solicitor's until payment of his share of the purchase-money. D. the same afternoon deposited the deeds with his bankers and never paid C. at all: Held, as between the bankers (equitable mortgagees by deposit) and C. (vendor having equitable lien), that the bankers, although second in date, were first in right, because of C's. negligence.<sup>2</sup>

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<sup>1</sup> Rice v. Rice, 2 Drew, 73. And see Spencer v. Clarke, 9 Ch. Div. 137.

<sup>2</sup> Rice v. Rice, 2 Drew, 73.

4. *Where there is equal equity, the law must prevail.*—This maxim is intimately connected with the one immediately preceding it; each depends on the other for its complete elucidation; each is the supplement of the other. The maxim immediately under consideration may be thus briefly explained: If the defendant has a claim to the passive protection of the court equal to the claim which the plaintiff has to call for the active aid of the court, he who has the legal estate will prevail. The case of *Thorndike v. Hunt*,<sup>1</sup> furnishes a remarkable illustration of the application of this rule. The trustee of a sum of stock for T. was ordered, in a suit instituted by his *cestui que trust*, T., to transfer the money into court. The transfer was made, and the fund was treated as belonging to T's. estate. The legal estate, therefore, vested in the Accountant-General (now Paymaster-General), for the purposes of T's. trust. But it afterwards appeared that the trustee had provided himself with the means of paying T's. fund into court by fraudulently misappropriating funds which he held in trust for another *cestui que trust*, B. The question was whether B. had a right to follow the money into court as against T's. estate. It was held that B. had no such right, and for the following reasons:—That T. had no notice of the want of equitable title or honest right in the trustee to make this payment with B's. money; that the transfer was for valuable consideration, because there was a debt due from the trustee for which the trustee would have been liable by execution of his goods, or by other means; that therefore B's. right or equity to follow the money being no greater than T's. right to retain it, the circumstance that the legal title was held for T. by the Accountant-General, was sufficient to create

4. Where there is equal equity, the law must prevail.

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<sup>1</sup> 3 De G. & J. 563.

a preference in favor of T. It is to be observed that B. was not altogether without a remedy, for, of course, he could proceed against the defaulting trustee personally for the trust money; but the case is a very hard one, and the like of which will not easily succeed again, the editor believes.<sup>1</sup>

Defence of purchase for valuable consideration without notice.

The most important class of cases in which the two connected maxims have received a practical application, are those where a purchaser sets up the defence that he has purchased for valuable consideration without notice of the adverse title. The person setting up this plea thereby admits that on his purchase a good title did not pass to him: it likewise assumes a conflict between a legal and an equitable title; or between the holder of a title, legal or equitable, and a person who is trying to assert an equity against him. It is evident from the nature of the case that the question cannot arise between two legal titles, for their co-existence in two adverse individuals in respect of the same subject-matter, is impossible. Nor can the plea be used by a person having an equitable title against another having equal equity who is prior in point of time. Having premised these remarks with regard to the general scope of this species of defense, it is proposed to direct the attention of the student to the various cases in which the defense may, or may not, be made available.

(a.) Plaintiff having equitable estate only, defendant legal estate and equitable estate both.

*Rule 1.* Where the person who sets up the plea has the legal estate, or even the best right to call for the legal estate, a court of equity will grant no relief against him.

1. Where purchaser obtains the legal estate at the time of purchase.

Nothing can be clearer than that a purchaser for valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity.

<sup>1</sup> Stackhouse v. Jersey (Countess), 1 J. & H. 721.

as well as at law, according to the well-known maxim: Where equities are equal, the law shall prevail. Thus A., the owner of an estate, contracts with B. to sell it to him, and B. pays a part of the purchase-money before the conveyance to him has been actually executed; in law, until the actual conveyance of the property to B., he has no title; whereas, in contemplation of equity, which looks on that as done which ought to have been done, B., from the moment of the contract, is the owner of the estate. If, then, A., after this contract of sale with B., makes an absolute conveyance of the legal estate to C., who purchases it for valuable consideration without notice of B's lien or claim; here, as C. has the legal estate in him, and has besides purchased *bona fide* for value without notice, and his equity to retain the estate is equal to B's right to enforce his equitable lien on it or claim to it, therefore the court of equity will refuse to give B. any relief as against C.

Not only is it clear that a purchaser for valuable consideration without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, will be protected, but it has also been decided that such a purchaser who has not obtained the legal estate at the time, may protect himself by subsequently getting in the outstanding legal estate, so long as he does not by that act become a party to a breach of trust;<sup>1</sup> because, as the equities of both parties are equal, there is no reason why the purchaser should be deprived of the advantage he may obtain at law by superior activity or diligence.<sup>2</sup>

<sup>2</sup> Where purchaser gets in the legal estate subsequently.

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<sup>1</sup> Saunders v. Dehew, 2 Vern. 271; Allen v. Knight. 5 Hare, 272.

<sup>2</sup> Goleborn v. Alcock, 2 Sim. 552; Pilcher v. Rawlins, 7 L. R. Ch. 259, overruling Carter v. Carter, 3 K. & J. 617.

In *Phillips v. Phillips*,<sup>1</sup> the law on the point is thus laid down by Westbury, L. C.:—"It is well known that if there are three encumbrancers, and the third encumbrancer, at the time of his encumbrance and payment of his money, had no notice of the prior encumbrances, then if the first mortgagee or encumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage he has so acquired, and to exclude the intermediate encumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title, for if the first mortgagee has not the legal title, the third mortgagee, by paying off the first, and obtaining a mere equitable transfer, acquires no priority thereby over the second."

3. Where purchaser has the best right to call for the legal estate.

And not only where the purchaser has *actually obtained*, but where he has the *best right to call for* the legal estate, will he be entitled to the protection of equity. Thus, in *Wilmot v. Pike*,<sup>2</sup> a first mortgage of the X. estate was made to A. in fee. A second mortgage in 1826 was then made to B. of the same estate, together with the Y. estate, by a release and conveyance of the respective premises to C. as a trustee for B., with the power of sale. B. afterwards, in 1835, advanced a further sum to the mortgagor on the security of the same estates X. and Y., but gave no notice of the further advance either to A. or to C. Subsequently C., in 1840, after inquiry of A., whether he had notice of any encumbrance other than his own and that of which C. was trustee for B., advanced a further sum on his (C's) own account to the mortgagor on the same security, and gave notice of his mortgage

<sup>1</sup> 10 W. R. 237; 31 L. J. Ch. 321; 8 Jur., N. S. 145; 5 L. T., N. S. 665.

<sup>2</sup> 5 Hare, 14.

to A. The question in the cause arose between B. and C. in respect of the third and fourth mortgages of 1835 and 1840 respectively, as to which was entitled to priority. It was held that, as to the X. estate, B. was entitled to priority over C. according to the maxim, *Qui prior est tempore, potior est jure*; for as regards that estate, B. and C. had only equitable interests, the legal estate being outstanding in A., the first mortgagee. But with regard to the Y. estate C., the fourth mortgagee, having the legal estate in him, although by virtue only of his position as a trustee in the second mortgage of 1826, and also having advanced his money without notice of B's further advance in 1835, was entitled to priority over B. as to such further advance. "If a first encumbrancer has a declaration of trust only by the borrower, and none by the trustee, and the second encumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to the deed, and declares himself a trustee for the second encumbrancer, will not that declaration by the trustee give the second priority over the first? I think the second would in that case have a better right to call for the legal estate than the first; and if it would be so in the case of a stranger, I think the trustee cannot be precluded by his situation as trustee from claiming the benefit of the legal estate without notice. His case, however, might perhaps be supported on the simple ground that he had the legal estate, and advanced his money without notice leaving every trust of which he had notice untouched by his present claim." Cases where questions arise between volunteers and subsequent purchasers for value may also be classed under this head.<sup>1</sup> A purchaser for value or mortgagee, having obtained possession of all the title-deeds would

What constitutes the best right to call for the legal estate?

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<sup>1</sup> Buckle v. Mitchell, 18 Ves. 100.

likewise have the best right to call for the legal estate.

(b.) Plaintiff having legal estate and defendant the equitable estate:  
(aa.) Auxiliary jurisdiction.

*Rule 2.* Where an application is made to the *auxiliary* jurisdiction of the court, as contradistinguished from its *concurrent* jurisdiction, by the possessor of a legal title, and the defendant pleads he is in possession as a *bona fide* purchaser for value without notice, the defense is good, and the court gives no aid to the legal title. This branch of the subject will be illustrated by the following cases:—

*Bassett v. Nosworthy*—discovery simply.

In *Basset v. Nosworthy*,<sup>1</sup> a bill was filed by an heir-at-law, claiming, under a legal title, against a person claiming as purchaser from the devisee under the will of his ancestor, but which will the plaintiff alleged had been revoked. The prayer of the bill was for discovery of the revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration, *bona fide*, without notice of any revocation, and the plea was allowed. Of course, the plaintiff might afterwards proceed at law in an action of ejectment, endeavoring there to make out his case upon his own evidence.

*Wallwyn v. Lee*—discovery and delivery up.

Again, in *Wallwyn v. Lee*,<sup>2</sup> a tenant in tail, in possession under a marriage settlement, filed a bill for discovery and delivery up of the title-deeds of an estate which had been mortgaged by his father, who was tenant for life under a settlement and a private Act of Parliament. The defendant pleaded that the plaintiff's father, alleging himself to be seized in fee, and being in actual possession of the premises as apparent fee-simple owner, and being also in possession of the title-deeds relating thereto as apparent fee-simple owner thereof, executed the

<sup>1</sup> 2 Smith's L. C. 1.

<sup>2</sup> 9 Ves. 24.



several mortgages under which the defendant claimed, and the defendant averred that he had no notice of the alleged fact that the plaintiff's father was only a tenant for life. It was argued for the plaintiff, that as the defendant was neither in possession, nor had the means of procuring it, the court ought not to allow him to keep the deeds for the sole purpose of (what counsel chose to call) extortion. It was held, however, that the plea was a good defense. "This bill," said Lord Eldon, "is filled by a person having got possession. If the principle is that this court will not stir against a purchaser for valuable consideration without notice, what are the legal rights of the son, tenant in tail, when his father's estate determines? His legal rights are that he shall have possession of the estate. I do not know that I am entitled to say as much of the title-deeds, but only that he may recover in trover the value of the deeds, or in detinue,<sup>1</sup> in which the judgment is for the deeds or their value. But without attending to the imperfection of the law in such actions, which is probably the ground of jurisdiction here for the specific delivery up of the thing, I will suppose his right at law to the specific delivery up. It is true he is not seeking in equity to recover possession of the estate; but he is seeking to recover something which he cannot recover at law, the value of which *non constat* he can recover at law without the discovery of the deeds. It is of necessity, then, that this court must hold, as against a purchaser for valuable consideration without notice, that if the possession of the estate has been got from him, the possession of the deeds shall be taken out of his hands by the court, and thrown to the person who has got from him the possession of the estate? Is it not worth while con-

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<sup>1</sup> See 17 & 18 Viet., ch. 125, sec. 78.

sidering rather, whether the very principle of the plea is not this:—‘I have honestly and *bona fide* paid for this, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bona fide*.’ ”

*Joyce v. Moleyns*—  
delivery up.

The principle of the last-mentioned decision was followed by Lord Chancellor Sugden in *Joyce v. De Moleyns*.<sup>1</sup> There the heir-at-law obtained possession of title-deeds relating to impropriate tithes, of which his second brother, under the will of their father, was tenant for life, and deposited them with bankers, by way of equitable mortgage, to secure a sum which the bankers advanced to him. On a bill being filed by the administrator of a bond creditor of the father for the administration of his estate, praying that the bankers might be decreed to deliver up the deeds, the bankers insisted that they were purchasers for valuable consideration, without notice of the will or of the title of any persons claiming thereunder, or of the demands of the plaintiff, and submitted that the bill should either be dismissed, or that the plaintiff should pay off the mortgage. The Lord Chancellor dismissed the bill as against the bankers, with costs. “I apprehend that the defense of a purchase for value without notice is a shield as well against a legal as against an equitable title. That this is a good defense cannot be denied. Suppose a tenant for life under a will with remainder over, and that the tenant for life, being heir-at-law of the testator, conveys the inheritance to a purchaser without notice; the remainderman cannot have any relief in equity against the purchaser. He must establish his title outside

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<sup>1</sup> 2 J. & L. 374.

of this court as well as he can. It is the same with respect to title-deeds. The defendants, therefore, use the possession of the deeds as they have a right to do, as a shield to protect them against the plaintiffs. They can make no use of the deeds themselves; they cannot maintain possession of them against the true owner; but in this court they have a right to say that they ought not to be compelled to deliver them up, as they obtained them *bona fide* and without fraud."<sup>1</sup>

But, as already suggested, it seems that this rule <sup>(bb.) Concurrent jurisdiction.</sup> does not apply where the Court of Chancery, *concurrently* with courts of common law, affords legal as distinguished from equitable relief. The case of *Williams v. Lambe*<sup>2</sup> well illustrates this distinction. There a widow filed a bill against a purchaser from her husband, claiming her dower. The defendant pleaded that he was a purchaser of the estate for value without notice of the vendor being married. Lord Thurlow, however, overruled the plea.

*Rule 3.* This rule is best stated in the words of Lord Westbury in *Phillips v. Phillips*<sup>3</sup>; "Now I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled in equity passes only that which he is justly entitled to, and no more. If, therefore, a person possessed of an equitable estate, the legal estate being outstanding, makes an assurance by way of mortgage, or grants an annuity and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely, the estate, subject to the annuity or mortgage, and no more. The subsequent grantee takes only that

<sup>1</sup> See also *Heath v. Crealock*, L. R. 18 Eq. 215; and, on appeal, 10 Ch. App. 22.

<sup>2</sup> 3 Bro. C. C. 264.

<sup>3</sup> *Supra*.

(c.) Plaintiff having equitable estate only, defendant also having equitable estate only.

which is left in the grantor. Hence grantees and encumbrancers claiming only in equity take and are ranked (*scil.*, in the absence of exceptional circumstances) according to the dates of their securities, and the maxim applies, *Qui prior est tempore, potior est jure*. The first grantee is *potior*, that is, *potentior*. He has a better and a superior, because a prior, equity. The first grantee has a right to be paid first; and it is quite immaterial whether the subsequent encumbrancers, at the time they took their securities and paid their money, had notice of the first encumbrance or not." Thus in *Ford v. White*,<sup>1</sup> property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B's encumbrance; C. registered his mortgage before B., and afterwards assigned to D., who had no notice of B.'s mortgage. Held by Sir J. Romilly, M. R., that as C.'s interest was equitable, he could not, by assigning it to D. without notice, put him in a better situation than himself, and consequently that D. was not entitled to priority over B.,—the prior registration by C. notwithstanding.

Notice of first encumbrance immaterial.

(d.) Plaintiff having an equity \*merely and not an equitable estate, defendant having both legal and equitable estates.

*Rule 4.* Where there are circumstances that give rise to an "equity," as distinguished from an "equitable estate;" for example, an equity to set aside a deed for fraud, or to correct it for mistake or accident, and the purchaser under the instrument puts forward the plea of purchase for valuable consideration without notice, the court will not interfere. Thus, in *Sturge v. Starr*,<sup>2</sup> a man, already married, performed the ceremony of marriage with a woman, and then joined with her in assigning her life interest in a trust-fund to a purchaser. Held, that though she might not have executed such an

<sup>1</sup> 16 Beav. 120.

<sup>2</sup> 2 My. & K. 195.

instrument had she been aware of the fraud practised upon her, that fraud could not affect the rights of a *bona fide* purchaser. This female had, doubtless, the strongest equity possible; but that equity, however strong *in se*, was no equity *as against the purchaser*.

No equitable doctrine is better established than The doctrine of notice. that the person who purchases an estate, although for valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser, Purchaser with notice of prior claim, a trustee to the extent of such claim, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat. Thus, in *Potter v. Sanders*,<sup>1</sup> it was held that if a vendor contract with two different persons for the sale to each of them of the same estate, and if the party with whom the second contract is made should, after notice of the first contract, procure a conveyance of the legal estate in pursuance of his second contract, the court will, in a suit for specific performance by the first vendee against the vendor and second purchaser, decree the latter to convey the estate to the plaintiff. And to such an extent has the doctrine of notice been allowed to prevail, that it has even infringed upon the policy of the Registration Acts. Thus, in *Le Neve v. Le Neve*,<sup>2</sup> where lands in a register county, settled on a first marriage by deed which was not registered, were settled upon a second marriage, with notice of the former settlement, by deed which was registered pursuant to the statute, it was held that the former settlement should be preferred in equity to the latter settlement. "This is a species of fraud and *dolus malus* itself; for there is

<sup>1</sup> 6 Hare, 1.

<sup>2</sup> 2 Sm. L. C. 35.

express knowledge that the first purchaser had the clear right to the estate, and with that knowledge an attempt is made to take away that right by getting in the legal estate." It must be borne in mind, that in the last-mentioned case, the husband who registered the second settlement was the person to blame for not registering the first. It also requires a very strong case to get over the effect of the local Registry Acts; *e. g.*, express notice amounting to fraud is required, and merely constructive notice is not sufficient.<sup>1</sup>

*Secus*,—sub-purchaser with notice, if his vendor bought without notice. Or sub-purchaser without notice, though his vendor bought with notice.

It has long been settled that if a person purchases for valuable consideration with notice, from a person who bought without notice, he may shelter himself under the first purchaser, for otherwise the first or *bona fide* purchaser would be unable to deal with his property, and the sale of estates would be very much clogged; and even if a person who buys with notice sells to a *bona fide* purchaser for valuable consideration without notice, the latter may protect his title. In *Harrison v. Forth*,<sup>2</sup> A. purchased an estate with notice of the plaintiff's encumbrance, and then sold it to B., who had no notice, who afterwards sold it to C., who had notice. *Held*, that though A. and C. had notice, yet if B. had no notice, the plaintiff could not be relieved against the defendant C. In this and similar cases, it may be assumed that the estate which A. had, which was successively assigned to B. and C., was the legal estate. Had the estates been equitable, as will have been seen from the third rule of this maxim, A., having had notice of a prior encumbrance, could not, by concealing his knowledge from B., make

<sup>1</sup>Lee v. Clutton, 24 W. R. 106; and, on appeal, 942; 45 L. J. Ch. 43; Bradley v. Riches, 26 W. R. 910; 9 Ch. Div. 212.

<sup>2</sup>Prec. Ch. 51; and see *Att'y. General v. Biphosphated Guano Co.*, 11 Ch. Div. 327.

B.'s purchase more extensive than his own, or give a better right to his assignee than that which he himself possessed.

A purchaser for valuable consideration of an estate, even with notice of a voluntary settlement, will not be affected by it, even though such voluntary settlement be in itself free from fraud, or even meritorious as a provision for relations.<sup>1</sup> This is a consequence of the words of the statute 27 Eliz., c. 4, against fraudulent conveyances.

Notice is either actual or constructive, but there is (in general) no difference between them in their consequences,<sup>2</sup> although in exceptional cases (as has been just pointed out) constructive notice has not the effect of actual notice. And, for many reasons, it is necessary to distinguish between actual and constructive notice.

1. As to actual notice, it suffices to say, that in order to make it binding, it must be given by a person interested in the property, and in the course of the negotiations.<sup>3</sup> Vague reports from persons not interested in the property will not affect the purchaser's conscience, nor will he be bound by notice in a previous transaction which he had forgotten. And not only is a mere assertion that some other persons claim a title not sufficient, but even a general claim by the person himself who gives the notice, is perhaps not sufficient to affect a purchase.<sup>4</sup>

In the recent case of *Lloyd v. Banks*<sup>5</sup> it was laid down by Cairns, L. C., that if it could be shown that a trustee in any way had got knowledge of a kind to operate upon the mind of any rational man,

Notice of voluntary settlement does not affect subsequent purchaser.

What constitutes notice.

Actual notice.

Rule in *Lloyd v. Banks*.

<sup>1</sup> *Buckle v. Mitchell*, 18 Ves. 100; [*Sexton v. Wheaton*, 1 Am. Lead Cas. 46, and note.]

<sup>2</sup> *Prosser v. Rice*, 28 Beav. 68.

<sup>3</sup> *Barnhart v. Greenshields*, 9 Moo. P. C. 18.

<sup>4</sup> *Sugd. V. & P.* 755.

<sup>5</sup> *L. R.* 3 Ch. 488.

or man of business, and to make him act with reference to the knowledge so obtained, then there had been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in a way inconsistent with the encumbrance so created.

Constructive notice.

2. Constructive notice in its nature is no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted,<sup>1</sup> unless by the most convincing evidence to the contrary.

What amounts to constructive notice depends on the circumstances of the case.  
*Jones v. Smith.*

It is by no means an easy matter to say what amounts to constructive notice; for much depends upon the circumstances of each particular case. In the case of *Jones v. Smith*,<sup>2</sup> Wigram, V. C., states the law on the subject with great clearness. The facts of that case were as follows:—A person before advancing money on a mortgage, inquired of the intending mortgagor and his wife whether any settlement had been made upon their marriage, and was informed that a settlement had been made, but of the wife's fortune only, and that it did not include the husband's estate—the only property which was proposed as a security. He then advanced the mortgage money, without having seen the settlement or knowing its contents. *Held*, that the mortgagee was not, under the circumstances, affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate. “It is scarcely possible to declare *a priori* what shall be deemed constructive notice, because unquestionably that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with

<sup>1</sup> *Plumb v. Fluitt*, 2 Anst. 438; *Henderson v. Graves*, 2 A. & E. 9.

<sup>2</sup> 1 Hare, 55.



sufficient accuracy for present purposes, assert that the cases in which constructive notice has been established, resolve themselves into two classes.

Firstly, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property, of which he had actual notice; and, secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from in-

1. Where actual notice of a fact, which would have led to notice of other facts.

quiring, for the very purpose of avoiding notice,—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts, which the *res gestæ* would suggest to a prudent mind, but if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser,

2. Where inquiry purposely avoided to escape notice.

then the doctrine of constructive notice will not apply; the purchaser will, in equity, be considered, as in fact he is, a *bona fide* purchaser without notice.” As an illustration of the first part of the rule, may be cited the case of *Bisco v. Earl of Banbury*.<sup>1</sup> In that case a person purchased with actual notice of a specific mortgage; the deed creating the mortgage referred to other encumbrances. *Held*, that the purchaser, knowing of the mortgage, ought to have inspected the deed, and that would have led him to a knowledge of the other deeds, and in that way the whole case must have been discovered by

Mere want of caution not constructive notice.

<sup>1</sup> 1 Ch. Ca. 287; and *disting.* *Allen v. Seckham*, 11 Ch. Div. 790.

him.<sup>1</sup> As an illustration of the second part of the rule, may be cited the case of *Birch v. Ellames*.<sup>2</sup> There the title deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, fourteen years after, upon the eve of the bankruptcy of the mortgagor, took a mortgage; he had notice of the deposit with the plaintiff, but avoided inquiring the purpose for which it was made. The court decreed for the plaintiff.<sup>3</sup>

Inquiry after title-deeds must be made.

But the mere absence of title deeds has never been held sufficient *per se* to affect a person with notice, if he has *bona fide* inquired for the deeds, and a reasonable excuse (*e. g.*, that the wife made jelly covers of them) has been given for the non-delivery of them; for in that case the court cannot impute fraud or gross and wilful negligence to him.<sup>4</sup> But the court will impute fraud or gross and wilful negligence to a person dealing respecting an estate, if he omits all inquiries as to deeds.<sup>5</sup>

Notice to agent, &c., notice to principal.

It is clear that notice to an agent, attorney or counsel for the purchaser is (for certain purposes at least), constructive notice to his principal. And the same rule applies if the same agent be concerned for both vendor and purchaser in the same transaction, even if the agent himself be the vendor.<sup>6</sup> However, notice to counsel, agents or solicitors, in order to affect in equity their employers, must have been given or imparted to them in the same transac-

Notice must have been in same transaction.

<sup>1</sup> *Ware v. Egmont*, 4 DeG., M. & G. 473.

<sup>2</sup> *Anstr.* 427.

<sup>3</sup> *Whitbread v. Jordan*, 1 Y. & C., Ex. Ca. 303.

<sup>4</sup> *Allan v. Knight*, 5 Hare, 272; *Hewitt v. Loosemore*, 9 Hare, 449; *Spencer v. Clark*, 9 Ch. Div. 137.

<sup>5</sup> *Worthington v. Morgan*, 16 Sim. 547. But distinguish *Lee v. Clutton*, *supra*.

<sup>6</sup> *LeNeve v. LeNeve*, 2 L. C.; *Spencer v. Topham*, 2 Jur., N. S. 865; *Saffron Walden Building Society v. Rayner*, 10 Ch. Div. 696; [*Hough v. Richardson*, 3 Story 668; *Astor v. Wells*, 4 Wheat, 466.]

tion; for, if the law were otherwise, it would make purchasers' and mortgagees' titles depend on the memory of their counsel or agents. Where, however, one transaction is closely followed by and connected with another, or where it is clear that a previous transaction must have been present to the mind of the solicitor or counsel when engaged in another transaction, there the second transaction is, to all intents and purposes, one and the same transaction.<sup>1</sup> This subject was fully considered by Wigram, V. C., in the important case of *Fuller v. Benett*.<sup>2</sup> There, after the commencement of a treaty for the sale of an estate by A., and the purchase of it by B., A. agreed to give C. a mortgage on the estate, as a security for an antecedent debt, and notice of the agreement with C. was given to the solicitors of B., the purchaser. The treaty for the sale by A. to B. afterwards ceased to be prosecuted for five years; and many things of course happened in the meantime. A. then died, and B. purchased the estate at a lower price from the heir and devisee of A. B. conveyed the estate in mortgage to D. The same solicitors were concerned for B., from the commencement of the treaty with A. until the final purchase of the estate, and for D. in the business of the mortgage. It was held, under the circumstances of the case, that B. and D. had through their solicitors, constructive notice of the agreement with C., and that the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mortgage. In the judgment his lordship thus succinctly lays down the general rules: "The general propositions,—first, that notice to the solicitor is notice to the client; secondly, that where a purchaser employs

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[<sup>1</sup> The Distilled Spirits, 11 Wall. 366.]

<sup>2</sup> 2 Hare, 394.

the same solicitor as the vendor, he (the purchaser) is affected with notice of whatever that solicitor had notice in his capacity of solicitor for either vendor or purchaser, in the transaction in which he is so employed; and thirdly, that the notice to the solicitor, which will alone bind the client, must be notice in that transaction in which the client employs him,—have not, as general propositions, been disputed at the bar.” Finally, in order to affect a person with a constructive notice of facts within the knowledge of his solicitor, it is necessary not only that the knowledge should be derived from the same (or what is practically the same) transaction, but the knowledge *must be material to that transaction, and such as it was the duty of the agent to communicate to his principal*. See *Wyllie v. Pollen*,<sup>1</sup> where it was held by Lord Westbury, C., that the transferee of a mortgage would not be affected by the knowledge of the solicitor acting for him in the transfer of an encumbrance subsequent to the original mortgage, so as to prevent him making further advances, such knowledge not being material to the business of the transfer. And of course this limit to the rule is only reasonable; in fact, the court very much dislikes this third variety of constructive notice, and the person who relies upon it must prove it very strictly.

5. He who seeks equity must do equity.

6. He who comes into equity must come with clean hands.

7. Equity aids the vigilant, not the indolent; in other words,—Delay defeats equities.

These three maxims may be viewed as together illustrating the great distinctive and governing principle of equity, that nothing can call forth a court

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<sup>1</sup>32 L. J. (Ch.), N. S. 782; and see *Bradley v. Riches*, 9 Ch Div. 212.

of equity into activity but conscience, good faith, and personal diligence.

5. As an illustration of the maxim, "He who seeks equity must do equity," may be briefly noticed the rules which govern what is termed a married woman's "equity to a settlement." The general rule is that when a *feme sole* marries, her property (not being settled to, or otherwise belonging to her, for her separate use), subject to certain conditions, passes to her husband; all her choses in action which the husband can reduce into possession, without the aid of a court of equity, and also all her things in possession, he may realize; but the moment he is obliged to ask the assistance of equity for that purpose, the court will only aid him on conditions. If, for instance, a testator bequeaths a legacy to a married woman, her husband can only realize the legacy through a court of equity. The moment the husband comes into court to claim it, the court will tell him, "We will help you to get all the money, only on condition that you make a fair settlement out of it for the benefit of your wife and children."<sup>1</sup>

Another illustration of the same maxim is, where a person having a title to an estate stands by and knowingly suffers a person ignorant of his title to expend money upon the estate, either in buildings or in other improvements, and then afterwards asserts his title in a court of law. Upon proving his title, judgment would, of course (subject to the recent changes), be given for him without any compensation for the improvements executed by the defendant. In equity, however (and consequently, now also in a court of law), a person who had expended money under such circumstances on the estate of another would be entitled to be indemnified

<sup>1</sup> Sturgis v. Champneys, 5 My. & Cr. 105.

for his expenditure, either by pecuniary compensation, or otherwise in some cases, *e. g.*, if he were a lessee under a defective lease, by a confirmation of his title.<sup>1</sup>

Compensation in cases of specific performance.

The maxim is also frequently illustrated in that class of cases where, in consequence of some misdescription in the property sold, a court of equity will not enforce specific performance of the contract at the suit of the vendor, unless he (the vendor) makes compensation to the defendant for the injury sustained by the latter from the misdescription,<sup>2</sup> and so conversely, if the purchaser seeks to profit by any such misdescription.

6. He who comes into equity must come with clean hands.

6. As an illustration of the second of the three kindred maxims, viz., "He who comes into equity must come with clean hands," may be cited *Overton v. Banister*,<sup>3</sup> in which this maxim received a very pointed illustration. There an infant, fraudulently concealing his age, obtained from his trustees part of a sum of stock to which he was entitled on coming of age; and when of age, a few months after, he applied for and received the residue of such stock. Then afterwards a suit was instituted to compel the trustees to pay over again the portion of stock improperly paid during minority; but the court held that the concealment of age was a fraud on the part of the infant, and neither himself nor his assignees were allowed to enforce repayment by the trustees of the stock paid during the minority.<sup>4</sup>

The rule must be understood to refer, of course, to wilful misconduct in regard only to the matter in

<sup>1</sup> *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Powell v. Thomas*, 6 Ha. 300. [And see *Willard v. Taylor*, 8 Wall. 557.]

<sup>2</sup> *Knatchbull v. Greuber*, 1 Mad. 153; *Hughes v. Jones*, 3 DeG., F. & J. 307.

<sup>3</sup> *Hare*, 503.

<sup>4</sup> *Savage v. Foster*, 9 Mod. 35; *Nelson v. Stocker*, 4 DeG. & Jo. 458, 464.

litigation, and not to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party in the cause has no concern.<sup>1</sup>

7. The doctrine expressed in the third of the three connected maxims, viz., “Delay defeats equities,” or (as it is otherwise expressed) “Equity aids the vigilant, not the indolent,” may be briefly summed in the language of Lord Camden in *Smith v. Clay*:<sup>2</sup> “A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence.”<sup>3</sup> And it may be added, that even a comparatively short period of delay, not satisfactorily accounted for, also tells heavily against a plaintiff in equity.

8. *Equality is equity*, or equity delighteth in equality.—This maxim has a very large application in many branches of equity; but it is perhaps nowhere so clearly illustrated as in the case of joint purchases and mortgages. If two persons advance and pay the purchase-money of an estate in equal portions, and take a conveyance to them and their heirs, it constitutes a joint-tenancy at law, that is, a purchase by them jointly of the estate with the chance of survivorship; and, of course, on the death of one, the survivor will take the whole estate. That is the rule not only at law, but also in equity as a general rule. But wherever circumstances

7. Delay defeats equities.

Vigilantibus non dormientibus, æquitas subvenit.

8. Equality is equity.

Equity leans against joint-tenancy,

<sup>1</sup> Sm. M. 23, [Brooks v. Martin, 2 Wall. 81.]

<sup>2</sup> 3 Bro. C. C. 640, note.

<sup>3</sup> Wright v. Vanderplank, 2 K. & J. 1; 8 DeG., M. & G. 133: Laver v. Fielder, 32 Beav. 1; Strange v. Fooks, 4 Giff. 408, [Badger v. Badger, 2 Wall. 94; Ellison v. Moffatt, 1 Johns. Ch. 46.]

occur which a court of equity can lay hold of to prevent a survivorship, the court will readily do so; for joint-tenancy is not favored in equity. Thus, in *Lake v. Gibson*,<sup>1</sup> it was laid down that where two or more purchase lands, and advance the purchase-money in *unequal* shares, and this appears on the deed itself, the mere circumstance of the inequality in the sums respectively advanced, makes them in the nature of *partners*; and however the legal estate may survive, yet the survivor will in equity be considered as a trustee for the other in proportion to the sum advanced by him, and, of course, a trustee also for himself in proportion to his own original share. "Where the parties advance the money *equally*, it may fairly be presumed that they purchased with a view to the benefit of survivorship; but where the money is advanced in *unequal* proportions, and no express intention appears to benefit disproportionately either of them, or especially the one advancing the smaller proportion, it is fair to presume that no such intention existed."<sup>2</sup> So, again, if two persons advance a sum of money, in equal or unequal shares, by way of mortgage, and take the mortgage to them jointly, and one of them dies, the survivor shall not in equity have the whole money due on the mortgage; but the representative of the deceased mortgagee shall have his proportion as a trust; for the mere circumstance that the transaction is a loan (and not a purchase) repels the presumption of an intention to hold the mortgage as a joint-tenancy,<sup>3</sup> as there could have been no original intention by such a transaction to eventually acquire the land itself.

Purchase-money  
advanced in un-  
equal shares.

Money advanced  
on mortgage,—in  
equal or in un-  
equal shares.

<sup>1</sup> 1 Sm. L. C. 198.

<sup>2</sup> Sugd. V. & P. 697. 1 Sm. L. C. 205.

<sup>3</sup> Rigden v. Vallier, 2 Ves. Sr. 258; Morley v. Bird, 3 Ves. 631.



9. "Equity looks to the intent rather than to the form."—Although this principle, even before the recent fusion of law and equity, was fully recognized in the common law, yet it was in equity that it received its complete exemplification. Equity would in no case permit the veil of mere form to hide the true bearings of a transaction. Thus it is a well-known rule that equity will relieve against a penalty or a forfeiture, unless in exceptional cases, *e. g.*, the case of landlord and tenant; if, therefore, it is satisfied that the sum of money specified in a bond is penal, it will refuse to enforce payment thereof in full, even though the parties may state in the bond in express words that the specified sum is not by way of penalty, but is to be held as the ascertained or "liquidated damages" for breach of the condition of the bond. To this maxim may be referred also the equitable doctrines that govern mortgages, and nowhere, perhaps, more than in these was the ancient divergence of equity from common law so strongly and clearly exhibited.<sup>1</sup>

9. Equity looks to the intent rather than to the form.

Relief against penalties and forfeitures.

10. "Equity looks on that as done which ought to have been done."—The true meaning of this maxim is, that equity will treat the subject-matter of a contract, as to its consequences and incidents, in the same manner as if the act contemplated by the parties had been completely executed. But equity will not thus act in favor of all persons, but only in favor of a limited class of persons, chiefly purchasers for value, whom equity regards with considerable affection. Thus, all agreements are considered as performed, which are made for a valuable consideration, in favor of persons entitled to insist upon their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been done. They are

10. Equity looks on that as done which ought to have been done.

<sup>1</sup>Peachy v. Duke of Somerset. 2 Sm. L. C. 1100.

Equitable conversion.

also deemed to have the same consequences attached to them: so that no party to these agreements or his privy shall derive benefit from his own laches or neglect to complete same; and the other party or his privy shall not suffer thereby. Thus, money by deed covenanted, or by will directed, to be laid out in land, is treated as already land in equity, from the moment that the deed and will respectively take effect. And, on the other hand, where land is by agreement contracted, or by will directed, to be sold, it is considered and treated as money. This maxim will be fully exemplified under the head of Equitable Conversion, hereinafter considered.

11. Equity imputes an intention to fulfil an obligation.

11. "Equity imputes an intention to fulfil an obligation."—Where a man is bound to do an act, and he does one which is capable of being considered as done in fulfillment of his obligation, it shall be so construed, because it is right to put the most favorable construction on the acts of others, and to presume that a man intends to be just before he is generous.<sup>1</sup> Thus if, on his marriage, a husband covenants to pay to the trustees of the marriage settlement the sum of £2,000, to be laid out in land in the county of D., and to be settled upon the trusts of the settlement; and if the husband never pays the money to the trustees, but soon after the marriage he does in fact himself purchase land in the specified county, and takes a conveyance thereof to himself in fee, and then dies intestate, without bringing the lands into, or showing any (other) the slightest intention of settling them upon the trusts of, the settlement,—there, the purchased lands will be considered as purchased by the husband in pursuance of his covenant, and will be liable to the trusts of the settlement.<sup>2</sup> Under this maxim the

<sup>1</sup> 2 Spence 204.

<sup>2</sup> Sowden v. Sowden, 1 Bro. C. C. 582.

doctrines of satisfaction and performance in equity, and which are both hereinafter considered, find their places.

[12. "Equity acts in personam." If the parties are within the jurisdiction of a Court of Chancery, the fact that the property is in another country or forum will not prevent it from granting relief. In the great case of *Penn v. Lord Baltimore*<sup>1</sup> the plaintiff and defendant, having by grants from the king of England obtained a large tract of land in America, had entered into articles to settle their respective boundaries, which the defendant refused to carry out. The plaintiff (both parties being in England at the time), applied for relief to the Court of Chancery. The court held that he was entitled to specific performance of the articles, for though the court had no original jurisdiction in the matter, the property being abroad, yet it could act on the persons. In like manner a trustee residing in one State may be compelled to make a conveyance of real estate lying in another,<sup>2</sup> and where the line of a railroad corporation which extends through several States, is sold under the foreclosure of a mortgage, the court may order the sale of the entire property, though part of it is outside the jurisdiction of the court making the decree.<sup>3</sup>

13. "Equity acts specifically." This maxim illustrates the great difference in the jurisdiction of equity and law. At law the only remedy on a breach of contract was an action for damages. Equity on the other hand in such a case acted *in specie*; *i. e.*, compelled the party to do the very thing he had agreed to do. In like manner equity will restrain the commission of a trespass, and

<sup>1</sup> [1 Ves. 444. 2 Wh. & Tud. L. Cas. Eq. 923.]

<sup>2</sup> [Vaughan v. Barclay, 6 Whart. 392.]

<sup>3</sup> [Muller v. Dows, 4 Otto, 444.]

compel a party to make good representations which have misled another. In both these cases all the common law courts could do was to give the injured party damages. This maxim will be illustrated in the chapters on Specific Performance and Injunction.]

## PART II.

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### *THE EXCLUSIVE JURISDICTION.*

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#### CHAPTER I.

##### TRUSTS GENERALLY.

PREVIOUSLY to the reign of Henry VIII., when the Statute of Uses was passed, a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee-simple in the lands. The courts of law did not deem any consideration necessary; but if a man voluntarily gave lands to another, and put him in possession of them, they held the gift to be complete and irrevocable—just as a gift of money or goods, made without any consideration, is, and has ever been, if accompanied by delivery of possession, quite beyond the power of the giver to retract. In law, therefore, the person to whom a gift of lands was made, and seisin thereof delivered, was considered thenceforth to be the true owner of the lands.<sup>1</sup> About the close of the

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<sup>1</sup> Williams' Real Property, 152.

Uses arise temp.  
Edw. III.

reign of Edward III., a new species of estate unknown to the common law sprung into existence. The Statutes of Mortmain had prohibited lands from being given for religious purposes. In order to evade the stringency of these statutes, the lawyers (true to their constant habit) hit upon a means of evading them, the device being that of taking grants to third persons *to the use* of the religious houses.<sup>1</sup> In process of time such grants or (speaking more properly) feoffments to one person to the use of another became usual even where no question of religion entered, and these uses, though alien to the common law, took root in the equity jurisprudence under the favoring influence of the Chancery, and even attained to a degree of influence and importance which eventually almost superseded the ancient common law.<sup>2</sup> In law, the person, and he only, to whom a gift of lands was made and seisin delivered, was considered the owner of the land. In equity,

Chancellor's jurisdiction over the conscience.

however, this was not always the case; for the Chancellor, in the exercise of his jurisdiction over the conscience, held that the mere delivery of the possession or seisin to a feoffee was not at all conclusive of the right of the feoffee to enjoy the lands of which he was enfeoffed. Equity was unable, it is true, to take from him the title which he possessed at law, because equity (as we have seen) never sets aside, however much it may avoid, the law; but equity could and did compel him to make use of his legal title for the benefit of the persons who had the better claim to the benefit thereof. Thus, if A. conveyed land to B. to the use of C., this declaration of the use charged the *conscience* of B., the legal feoffee or grantee, but did not attach to the very *land* itself. If, therefore, B. refused to

<sup>1</sup> 2 Black. Com. 328.

<sup>2</sup> Hayes' Intro. 33.

account to his *cestui que use* (*i. e.*, he to whose use the property was conveyed, viz., C.) for the profits, or wrongfully conveyed the estate to another than C., this was a breach of confidence on the part of B., but one for which the common law gave no redress, not recognizing C. at all, but only B., as the owner of the land. To B., and to B. alone, attached the privileges and the liabilities of a landholder; for *he* it was to whom the possession was legally delivered. It was accordingly decided at a very early period,<sup>1</sup> that the courts of common law had no jurisdiction whatever in regard to such uses as that in favor of C. But means were soon devised for compelling B., the owner in point of law, to keep good faith towards C., the owner in point of conscience. The king, in his Court of Chancery, assumed a jurisdiction to extort a disclosure from B. upon his oath of the nature and extent of the confidence reposed in him, and to enforce a strict discharge of the duties of his trust. Hence equity arose. From the period when the right of C. became cognizable in the Court of Chancery, he became in fact the equitable or true and beneficial owner, and B. became merely the legal owner. But the Court of Chancery, in assuming jurisdiction over the use, left untouched and inviolate the ownership at the common law, because, in fact, as we are always saying, equity never could, nor can, upset (however much it may avoid) the law. The Court of Chancery exercised no direct control over the land, but exercised control over the person of the legal owner, and coerced him if he obstinately resisted its authority. It will be seen, therefore, that, by the introduction of the device of uses, many of the rules of property were virtually defeated; and that the clergy, *e. g.*, who were prohibited by law from ac-

Uses not recognized at common law.

Uses recognized in equity.

Equity recognized also the rules of law.

<sup>1</sup> 4 Edw. IV.

Opportunities for  
the abuse of the  
use.

quiring land, could, notwithstanding, acquire all the benefit thereof. Likewise, the factious baron might vest his estate at law in friends, and afterwards commit treason with impunity; and the ordinary proprietor, adopting the same precaution, might enjoy and also dispose of the beneficial interest, regardless of his lord and regardless also of the common law.<sup>1</sup> It is not, indeed, suggested, although some writers have suggested, that these opportunities were abused; it is merely stated that the opportunities for abuse existed. But the legitimate advantages arising from the use were very great; and among the benefits so conferred upon the landowner, the power of disposing of his lands by will, a power that is properly incident to ownership, was one of the most valuable and important. The land itself, it is true, was not yet devisable, but the use of the land was so; and the legal owner was bound in equity to observe the testamentary destination of the use.<sup>2</sup>

Statute of Uses,  
27 Hen. VIII. c. 10  
converted the use  
into the legal es-  
tate, i. e., land at  
law.

The inroads which uses had made, and were still making, on the ancient law of tenure, at length induced the legislature to pass a statute for their regulation, viz.: the famous Statute of Uses.<sup>3</sup> By this statute it was enacted, that where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, the persons that *have* any such use, confidence or trust, (by which were meant the persons beneficially entitled), shall be deemed in lawful seisin and possession of the same lands and hereditaments for such estates as they have the use, trust, or confidence. In other words the *use* became converted into the *land*; the use by

<sup>1</sup> Hayes' Intro. 34, 35.

<sup>2</sup> Hayes' Intro. 36.

<sup>3</sup> 27 Hen. VIII., c. 10.



virtue of the statute was the land. The result of this enactment will be best seen in one or two examples. Suppose a feoffment made to A. and his heirs, and the seisin duly delivered to him. If the feoffment is expressed to be made to A. and his heirs, to the use of B. and his heirs, A., who would before the statute have had an estate in fee-simple at law, now takes no permanent estate, but is by virtue of the statute a mere conduit pipe for conveying the estate to B. For B., who would before have had the use, shall now, having the use, be deemed in lawful seisin and possession of the lands—in other words, shall have the land, not only the beneficial interest, but also the fee-simple estate at law, which is wrested from A. by virtue of the statute. Again, suppose a feoffment to be made by X to A. and his heirs simply, without any consideration. Before the statute, X., the feoffor, would, in this case, have been held in equity to have the use, for want of any consideration to pass it to the feoffee; therefore, after the statute, X., the feoffor, having the use, shall be deemed in lawful seisin and possession of the land; and, consequently, by such a feoffment, although livery of seisin is duly made to A., yet no estate will pass to A.: for the moment A. obtains the estate, he holds it to the use of X., the feoffor, and the same moment instantly comes the statute and gives to the feoffor, who has the use, the seisin and possession also. The feoffor, X., therefore, instantly gets back all that he gave, and the use is said to *result* to himself;<sup>1</sup> so much so, that X. is held to be *in* again of his old estate,—the intervening feoffment, with all its heavy formalities, reckoning for nothing.

<sup>1</sup> Express use.

<sup>2</sup> Resulting use.\*

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<sup>1</sup> 1 Sand. Us. 99, 100.

The consideration required to rebut a resulting use.

With regard to the question, What is a sufficient consideration? it was anciently the rule, even in equity, that a consideration, however trifling, given by the feoffee, was sufficient to entitle him to retain for his own benefit absolutely the lands of which he was enfeoffed;<sup>1</sup> although the entire absence of any consideration caused the use or beneficial ownership to result or to revert to the feoffor. But the Court of Chancery at the present day takes a different view, and will not grant or withhold its aid merely according as there is or not a merely trifling and nominal consideration, *e. g.*, the customary five shillings' consideration; thus, circumstances of fraud, mistake, or the like, may induce the Court of Chancery to order the grantee, under a voluntary or practically voluntary conveyance, to hold merely as a trustee for the grantor; and it may be stated even more strongly than that, because, in fact, when the consideration is either absent or merely nominal, the *onus* is upon the grantee to prove the intention of a beneficial gift to him, and failing such proof, the grantor enjoys the benefit, although the estate at law may continue vested in the grantee. This is not contrary to that other doctrine of the courts of equity, hereinafter spoken of, that the mere want or inadequacy of valuable consideration is not a sufficient cause for interference.<sup>2</sup>

Statute of Uses,—  
failure of its ob-  
ject.

The object of the enactment was completely to extirpate the doctrine of uses and trusts; we shall, however, see that the statute, so far from effecting that object, rather gave a fresh stimulus to the system it was intended to destroy. The statute aimed at rendering uses innoxious, by turning them into legal estates; but the common-law judges deter-

<sup>1</sup> 1 Sand. Us. 59, 62.

<sup>2</sup> Coles v. Trecothick, 9 Ves. 246.

mined that if A., the legal owner of the land, was directed to hold the land to the use of B., who was directed to hold it to the use of C., the statute would carry the land to B. at law, but carry it no further, however plainly the intention might appear that the use or benefit was really designed for C. The ultimate use in favor of C. was "a use upon a use," *i. e.*, a second use upon or after a first use, which second use the statute, having (in the opinion of the courts of common law) exhausted itself over the first use in favor of B., had no remaining energy to reach.<sup>1</sup> It is scarcely necessary to point out, that the opinion of the courts of common law, although generally declared illiberal and narrow, was strictly right according to the accepted rules for the interpretation of statute law; and, in fact, many advantages have arisen from it. And among these advantages the line of demarcation between the legal and the equitable ownership was drawn broadly and unmistakably. In order to create, after the passing of the statute, an interest purely equitable, nothing more was necessary than to declare a second use. Suppose, for example, that A. sold land to B., and B. desired to have the legal estate vested in C., in trust for B., the object was effected by A.'s conveying the land to B. to the use of C., to the use of, or, as we should now express it, in trust for B. Here the land passes by the conveyance to B. under the old law, and the use in favor of C. carries the land to C. by virtue of the statute; and the beneficial and only substantial use being once more received into the bosom of equity, B. was there acknowledged as the beneficial owner,<sup>2</sup> that is to say, the equitable owner.

No use upon a use at law.

Hence the equitable jurisdiction.

<sup>1</sup> Lloyd v. Passingham, 6 B. & C. 365; Hayes' Intro. 53.

<sup>2</sup> Hayes' Intro. 53.

We have now arrived at a very prevalent and important kind of interest, namely, an estate in equity merely, and not at law. The owner of such an estate had (prior to the recent fusion of law and equity) no title at all in any court of law, but must have had recourse exclusively to the Court of Chancery.

*Trust distinguished from use — for convenience only.*

The word *trust* is never employed in modern conveyancing when it is intended to vest an estate in fee-simple in any person by force of the Statute of Uses. Such an intention is always carried into effect by the employment of the word *use*; and the word *trust* is reserved to signify a holding by one person for the benefit of another, similar to that which before the statute was called a use.<sup>1</sup>

*Equity follows the analogy of the law,—as regards equitable estates.*

In the construction and regulation of trusts, equity is said to follow the law; that is, the Court of Chancery generally adopts the rules of law applicable to legal estates. Thus a trust for A. for his life, or for A. and the heirs of his body, or for A. and his heirs, will respectively give A. an equitable estate for life, an equitable estate in tail, or an equitable estate in fee-simple. Again, an equitable estate in fee-simple immediately belongs to every purchaser of freehold property the moment he has signed a contract for its purchase. If, therefore, the purchaser were to die intestate, the moment after a contract is completed as a contract simply, the equitable estate in fee-simple which he had just acquired would descend to his heir-at-law, and the vendor would be a trustee for such heir, and would also be compellable to make a conveyance of the legal estate to the heir.<sup>2</sup>

*Property to which the Statute of uses is inapplicable.*

Not only the refusal of the common law to recognize a use upon a use,—a refusal depending, as

<sup>1</sup> Wms. Real Prop. 156; 1 Sand. Us. 278.

<sup>2</sup> See Wms. R. Prop. 160, 161.

we have seen, upon the construction of the Statute of Uses,—but a further question of construction which arose on the statute, and which the courts of law construed in the like spirit (correct, but in appearance narrow and illiberal), tended to very much limit the application of the statute. The Statute of Uses, it will be observed, was pointed at the extirpation of uses of lands, tenements, and hereditaments only, and therefore it extended not to other species of property; and further, it will also be observed, as the statute spoke, in the case of lands, etc., only of persons “*seised*” of lands, etc., to the use of another or others, and seisin strictly so called applied and applies to freeholds only, and neither to leasehold nor to copyhold lands, it followed that the statute was confined in its legal operation to freehold lands. Consequently the properties to which the Statute of Uses does not apply at law are much more numerous than the properties to which it does apply at law, and may be enumerated as follows:—

1. Pure personal property generally.
2. Impure personal property; otherwise chattels real; or leasehold lands; and
3. Copyhold lands.<sup>1</sup>

Thus, with regard to all these three classes of properties, if any of them was vested in A. to the use of B., the state was held not to transfer the legal interest to B., which therefore remained in A. at law, and B’s use underwent no change except a change of name, for it was now called, in conformity with the style adopted in regard to freehold interests, a *trust*.<sup>2</sup> And generally, with regard to trusts of all these three classes of property, the rules to be applied after the statute were the

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<sup>1</sup> 2 Ves. Sr. 257; 1 Sand. Us. 249.

<sup>2</sup> Gilb. Us. 79.

same that they were subject to before the statute. And as to freeholds even, only uses of a certain description were operated on by the statute. The only uses to which the statute applied were *passive* uses; for in regard to active uses, being uses which impose (as the name denotes) some active duties on the feoffee, *e. g.*, to sell the land and divide the money, or to pay debts, etc., the statute was necessarily inoperative.<sup>1</sup>

Statute of Frauds  
—trusts origin-  
ally created by  
parol, required  
henceforth in  
general to be cre-  
ated by writing.

The next important statute that has a bearing upon trusts is the Statute of Frauds.<sup>2</sup> Before that statute, trusts of every species of property might have been created, or might have been passed from one person to another, without any writing, and without the use even of any particular form of words. But in consequence of the danger of permitting the often complicated directions of a trust to depend upon so uncertain a thing as memory, and generally to shut the door against the numerous frauds that might otherwise have entered under the pretext of simplicity, the legislature thought fit to enact that certain species of trusts should be in writing. By the Statute of Frauds it was accordingly enacted as follows:—

Sec. 7. That all *declarations or creations* of trusts or confidences, of any *lands, tenements or hereditaments*, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts, or by his last will in writing.

*N. B.*—The party here referred to as by law enabled to declare the trust, is of course the beneficial owner.<sup>3</sup>

<sup>1</sup> Hayes' Intro. 51.

<sup>2</sup> 29 Car. II., c. 3.

<sup>3</sup> *Kronheim v. Johnson*, 7 Ch. Div. 60.

Sec. 9. That all *grants* and *assignments* of ANY trusts or confidence shall likewise be in writing signed by the party granting or assigning the same, or by his last will.

Sec. 8. Recognizes two exceptions from the statute, viz:—

(a.) Trusts arising or resulting from any conveyance of lands or tenements, by implication or construction of law; and,

(b.) Trusts transferred or extinguished by act or operation of law.

It is clear that the last mentioned statute extends to freehold lands; it has been decided that copyhold lands,<sup>1</sup> and also leasehold lands or chattels real,<sup>2</sup> are likewise within the Act, but that pure, personal estate, *i. e.*, chattels personal, are not within the Act.<sup>3</sup> But so far as regards chattels personal, all that the court has ever decided is, that they are not within the 7th section (which treats of the declaration or original creation only of a trust); and it is the editor's opinion that chattels personal are within the 9th section (which treats of the grant *i. e.* the assignment, of an already created and subsisting trust.)

A trust, as will be seen from the instances above given, is a beneficial interest in, or a beneficial ownership of, real or personal property unattended with the legal ownership thereof.<sup>4</sup>

Trusts may be classified under three heads: *express trusts*, *implied trusts*, and *constructive trusts*. Those falling under the first of these three heads may be again subdivided, according to their objects

Property to which the Statute of Frauds is applicable.

Definition of trust.

Classification of trusts, — express, implied and constructive.

<sup>1</sup> Lewin Tr. 43; Withers v. Withers, Amb. 151.

<sup>2</sup> Forster v. Hale, 3 Ves. 696; Riddle v. Emerson, 1 Vern. 108.

<sup>3</sup> McFadden v. Jenkins, 1 Ph. 157; Benbow v. Townsend, 1 My. & K. 506.

<sup>4</sup> 2 Sp. 875.

or their end and purpose, into *express private trusts* and *express public [or charitable] trusts*. Trusts implied and constructive, being the trusts falling under the second and third heads, are frequently confounded, or at least classed together, and it is not always easy to draw the line between them. It is proposed in the succeeding chapters to treat of each head or class of trust in the order above enumerated.



## CHAPTER II.

## EXPRESS PRIVATE TRUSTS.

An express trust is a trust which is clearly ex-Express trusts.  
pressed by the author thereof, whether verbally or  
by writing. Express trusts are of many varieties,  
which it is proposed to expound in order one after  
another.

Firstly, An express trust may be either *executed*<sup>1. Executed or</sup>  
*or executory*. A trust is said to be executed when <sup>executory.</sup>  
no act is necessary to be done to give effect to it,  
the trust being finally declared by the instrument  
creating it; as where an estate is expressed to be  
conveyed to A. in trust for B., and the conveyance  
actually accomplishes what it professes to do. On  
the other hand, a trust is executory when there is a  
mere direction to convey upon certain trusts, and  
the instrument containing the direction to convey  
does not of itself, *proprio vigore*, effect the con-  
veyance which it directs. "All trusts," observes  
Lord St. Leonards, "are in a sense executory, be-  
cause there is always something to be done. But  
that is not the sense which a court of equity puts  
upon the term 'executory trust.' A court of equity,  
in considering an executory trust as distinguished  
from a trust executing itself, or executed trust,  
distinguishes the two in this manner—Has the tes-  
tator been what is called, and very properly called,  
his own conveyancer? Or has he, on the other

hand, left it to the court to make out from *general expressions* what his intention is. If he has so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates, then the trust is executed; but, otherwise, it is executory.”<sup>1</sup>

As to trusts executed—equity follows the law.

In the case of trusts executed, a court of equity will put the same construction on technical words as is put by a court of law on limitations of legal estates. If, for instance, an estate is vested in trustees and their heirs in trust for A. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of the body of A., the trust being an executed trust, A., according to the rule in *Shelley's case*, which is a rule of law, will be held to take an estate tail;<sup>2</sup> and to this rule it is believed, there is no exception whatsoever.

As to trusts executory,—equity may or may not follow the law.

On the other hand, in the case of an executory trust, that is to say, a trust raised either by stipulation or direction in express terms, or by necessary implication, to make a settlement or assurance to uses or upon trusts which are indicated in, but not finally declared by, the instrument containing such stipulation or direction, as in the case of marriage articles, and as in the case of a will where property is vested in trustees to *settle* or *convey* in a more perfect and accurate manner, in both which cases a further act—viz.: a settlement or a conveyance—is contemplated, then in these and the like cases a court of equity sometimes does, and sometimes does not, put the same construction on technical words as is put by a court of law on limitations of legal estates. It is unnecessary to say that the

<sup>1</sup> *Egerton v. Brownlow*, 4 H. L. Cas. 210. [*Tillinghast v. Coggeshall*, 7, R. I. 383.]

<sup>2</sup> *Jervoise v. D. of Northumberland*, 1 J. & W. 559.

court of equity in thus acting, does not act capriciously or arbitrarily, but pursues with steadfastness certain rules or principles, which may be rendered easily intelligible. We shall endeavor to make them so; and for that purpose, it is to be observed as follows:—

1. In cases of executory trusts, that is, where the trusts remain to be executed in the sense of perfect limitation above explained, a court of equity will not invariably construe the technical expressions in the document declaring the trust with legal strictness, but will occasionally execute the trust, and, if necessary, mould them according to the intention of the creator of the trusts, even if that intention should be contrary to the strict legal effect of the language he has used. But if no such contrary intention can be collected, either from the instrument itself or from the nature of the case, a court of equity is bound to construe, and always does construe, the technical terms used in the instrument in strict accordance with their legal meaning.<sup>1</sup>

2. There are two documents (and, it is believed, two documents only) in which executory trusts are found; and these documents are,—firstly, Marriage Articles; and, secondly, Wills.

Now, firstly, in marriage articles, the very object and purpose of these furnish in themselves an indication of intention. Their object is, of course, to make a provision for the issue of the marriage by a properly executed settlement, framed so as to carry out the clauses which the articles only imperfectly express; and it is not to be presumed that the contracting parties meant to put it in the power of either to defeat that purpose by limiting the estate to himself or herself absolutely. If, therefore, the

Two guiding principles in executory trusts.

(a.) Marriage articles,—intention always implied.

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<sup>1</sup> Glenorchy v. Bosville, 1 Smith L. C. 1.

(b.) Wills,—intention requires to be expressed.

agreement is to limit an estate for life to either or both of the contracting parties, with remainder to the heirs of the body or bodies of him, her, or them, the court decrees a strict settlement in conformity to the presumable intention. But, secondly if a will directs the like limitation for life, with the like remainder to the heirs of the body, the court has no such object or purpose necessarily before it as a ground for decreeing a strict settlement; and therefore, in the case of a will, it is not a matter of course, as it is in the case of marriage articles, to decree a strict settlement; and the court therefore, does not invariably, but only occasionally, do so. A testator gives arbitrarily what estate he thinks fit; there is no presumption that he means one quantity of interest rather than another—an estate for life rather than in tail or in fee. The testator's intention in respect of the quantity of interest to be given can be known only from the words in which it is expressed, or rather directed to be given; but if it is clearly to be ascertained from the words of the will that the testator did not mean to give that precise quantity of estate which the words of limitation, when construed in strict accordance with the rules of law, would in fact give, then the court will decree such a settlement as the testator appears to have intended, and will depart from his literal words in order to execute that intention.<sup>1</sup>

Each branch of the subject must be considered separately from the other—Firstly, therefore, as to executory trusts in marriage articles:—

Executory trusts under marriage articles,—  
(a.) Court will decree a strict settlement in conformity with presumed intention.

If in articles before marriage for making a settlement of the real estate of either the intended husband or the intended wife, or of both, it is agreed that the estate shall be settled upon the heirs

<sup>1</sup> Blackburn v. Stables, 2 V. & B. 369; Deehurst v. St. Albans, 5 Mad. 260.

of the body of them, or either of them, in such terms as would, if construed with legal strictness, according to the rule in *Shelley's case* give both or either of them an estate tail, and enable both or either of them to defeat the provision for their issue, courts of equity, considering the object of the articles, viz: to make provision for the issue of the marriage, will, in conformity with the presumed intention of the parties, decree a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage in tail as purchasers. Thus, in *Trevor v. Trevor*,<sup>1</sup> A., in consideration of a then intended marriage, covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the heirs male of him on her body begotten, and the heirs male of such heirs male issuing, remainder to the right heirs of the said A. forever:—Lord Macclesfield said that upon articles the case was stronger than on a will; that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled when they came to be carried into execution as to make them effectual; and that the intention was to give A. only an estate for life; that if it had been otherwise the settlement would have been vain and ineffectual, and it would have been in A's power as soon as the articles were made to have destroyed them. And his lordship therefore held that A. was entitled to an estate for life only, and that his eldest son took by purchase, as tenant in tail.<sup>2</sup>

It is believed that, in the case of marriage articles (not expressly directing to the contrary), there is no instance in which a court of equity has decreed,

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<sup>1</sup> 1 P. W. 622.

<sup>2</sup> Affd. in H. of Lds. 5 Brown, P. C. Toml. ed. 122; Streatfield v. Streatfield. Ca. t. Talb. 176.

or will decree, any settlement other than a strict settlement like that decreed in *Trevor v. Trevor*, *supra*.

(b.) Executory trusts in wills,—court seeks for the expressed intention.

Secondly,—As to executory trusts in wills—

The intention of the testator must appear from the will itself that he meant “heirs of the body,” or words of similar legal import, to be words of purchase, and not of limitation; otherwise, courts of equity will direct a settlement to be made according to the strict legal construction of those words.

Construed strictly in the absence of an expressed intention to the contrary,—*Sweetapple v. Bindon*.

Suppose, for instance, a devise to trustees in trust to convey to A. for life, and after his decease to the heirs of his body; here, as no indication of intention appears that the issue of A. should take as purchasers, the rule of law will prevail, and A. will take an estate tail, although as we have already seen, in the case of marriage articles similarly worded he would have taken only an estate for life. Thus, in *Sweetapple v. Bindon*,<sup>1</sup> B., by will, gave £300 to her daughter Mary, *to be laid out* by her executrix in lands, *and settled* to the only use of her daughter Mary and her *children*, and if she died without *issue*, the land to be equally divided between her brothers and sisters then living. Lord Cowper said that had it been an immediate devise of land, Mary the daughter, would have been by the words of the will, tenant in tail; and in the case of a voluntary devise, the court must take it as they found it, and not lessen the estate or benefit of the devisee, although upon the like words in marriage articles it might have been otherwise.

Construed according to contrary intention,—if that is expressed,—*Papillon v. Voice*.

On the other hand, if, for instance, there is a devise to trustees, upon trust to convey to A. for life, and after his decease to the heirs of his body, and

<sup>1</sup> 2 Vern. 536. And see the Rule in Wild's case, Tud. Conveyancing Cases, 3d., ed. 669.

in the will there are expressions from which it can be fairly inferred that the testator wanted a strict settlement of the lands devised, for example, either from the will mentioning the testator's desire that A. should marry, or from the testator expressing that A. (notwithstanding the apparent limitations aforesaid) should not have power to bar the entail, or other like words,—then the court of equity will endeavor to effect that intention, and will decree a strict settlement to be for that purpose executed. Thus in the case of *Papillon v. Voice*,<sup>1</sup> where A. bequeathed a sum of money to trustees in trust, to be laid out in the purchase of lands, *to be settled* on B. for life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B., remainder over, *with power to B. to make a jointure*; (and by the same will, A. *devised lands* to B. for his life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B., remainder over),—Lord Chancellor King declared, as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of B.,—this last remainder was in the general rule, and the words of it must operate as words of limitation, and consequently create a vested estate tail in B., and that the breaking into this rule would occasion the utmost uncertainty; but as to the other part, he declared that the court had power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate, and where it

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<sup>1</sup> 2 P. W. 471.

was only executory, and the party must come to the court in order to have the benefit of the will; that in the latter case the intention should take place, and not the rules of law; so that as to the lands to be purchased, they should be limited to B. for life, with power to B. to make a jointure, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male successively, remainder over. - And the reader will have observed that, in the last-mentioned case, the already acquired lands devised by the will were so devised upon an *executed* trust,—so that the rule in Shelley's case could not but apply, as we have, in fact, already stated at the outset of this chapter; but that, in the same case, the lands *to be purchased*, and then afterwards *to be settled*, devised by the will were so devised upon an *executory* trust,—so that the court was free to apply (or not to apply) the rule in Shelley's case, according as it found (or did not find) in the will itself some reference to a marriage or other indication of an intention contrary to the strict construction of the words. Now, the reference to *jointuring* was a reference to marriage, and was also a sufficient reference for the court to act upon. That reference took, in fact, that particular portion of the will out of the category of devises altogether, and put it (in effect) into the category of (one-sided) marriage articles; and, of course, the usual consequences had to follow, as above expounded.

What expressions have been held to show a contrary intention.

In the following further cases, it was held that there had been a sufficient indication of the testator's intention that the words, "heir of the body," or words of similar import, should be construed as words of purchase, and not of limitation, viz.,—where trustees were directed to settle an estate upon A. and the heirs of his body, taking special care that it should not be in the power of A. to



dock the entail of the estate given to him during his life;<sup>1</sup> or, again, "in such manner and form \* \* \* as that, if A. should happen to die without leaving lawful issue, the property might then after his death descend unencumbered to B.;"<sup>2</sup> so also a direction that the settlement shall be made "as counsel shall advise," has been held to indicate an intention that there should be a strict settlement.<sup>3</sup>

Secondly,—An express trust may be either a voluntary trust or a trust for valuable consideration. II. Voluntary trusts, and trusts for value. Preliminary to entering upon the subject of voluntary conveyances and trusts, it may be useful to lay down a few principles of general application to the subject.

1. The principle of the maxim, *Ex nudo pacto non oritur actio*, is as universally recognized in General Rules.  
1. *Ex nudo pacto non oritur actio.* English equity as at law. Thus, in *Jefferys v. Jefferys*,<sup>4</sup> a father, who had by voluntary settlement conveyed certain freeholds, and covenanted to surrender (but had never actually surrendered) certain copyholds to trustees in trust for the benefit of his daughters, afterwards devised the same freehold and copyhold estates to his widow, by a will dated subsequently to Preston's Act, 1815 (55 Geo. III., c. 192), being the Act which first rendered a surrender to the uses of the will unnecessary. It followed from this that the will was completely effective not only as to the freehold lands, but also as to the copyhold lands, while the deed of voluntary settlement was completely effective as to the freeholds, but only incompletely effective as to the copyholds. A suit having been instituted by the daughters after the testator's death to have the

<sup>1</sup> *Leonard v. Sussex*, 2 Vern. 526.

<sup>2</sup> *Thompson v. Fisher*, L. R. 10 Eq. 207.

<sup>3</sup> *Bastard v. Proby*, 2 Cox, 6.

<sup>4</sup> Cr. & Ph. 138.

trusts of the settlement carried into effect, and to compel the widow to surrender to them the copyholds to which she had meanwhile been admitted, the Lord Chancellor said,—“The title of the plaintiffs (the daughters) to the freeholds is complete; and being first in date, is also first in right. But with respect to the copyholds, I have no doubt that the court will not execute a voluntary contract; and my impression is, that the principle of the court, to withhold its assistance from a volunteer, applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement.”<sup>1</sup> Consequently, the widow kept the copyholds, but the daughters got the freeholds.

2. Imperfect conveyance,—evidence of a contract.

2. An imperfect conveyance is in equity regarded as evidencing a contract, binding or not binding as the case may be;<sup>2</sup> and when this statement is resolved into its elements, it amounts to this—(1) An imperfect conveyance, if for valuable consideration, is binding,<sup>3</sup> and (2) an imperfect conveyance, if voluntary, is not binding. And reading these principles backwards, they hold equally true; for (1) a conveyance for value is binding, although imperfect; but (2) a voluntary conveyance is not binding, if imperfect.

3. Trust may arise without consideration.

3. On the other hand, a voluntary conveyance may, of course, be perfect; and if perfect, it will be binding. In other words, a trust may be raised without any consideration. In *Ellison v. Ellison*,<sup>4</sup> Lord Eldon says,—“I had no doubt that from the moment of executing the first deed, supposing it not to have been for wife and children, but for pure volunteers, these volunteers might have filed a bill

<sup>1</sup> *Wilkinson v. Wilkinson*, 4 Jur., N. S. 47.

<sup>2</sup> *Parker v. Taswell*, 4 Jur., N. S. 183; 2 DeG. & J. 559.

<sup>3</sup> [*Wadsworth v. Wendell*, 5 Johns. Ch. 224.]

<sup>4</sup> 1 Smith, L. C. 271.

in equity on the ground of their interest under the instrument. . . . I take the distinction to be that if you want the assistance of the court to *constitute* you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of *constituting* you *cestui que trust*,"<sup>1</sup> implying that, if you are already completely *constituted*, then you are all right, and may enforce your rights under the deed.

It will be found, in fact, that all the cases which have been decided on voluntary trusts, whether in favor of or against the volunteers, have turned upon the single inquiry,—Has the trust been completely constituted or declared? Because, if so, it is binding: and if not so, it is no good at all, even as a ground of action for completely constituting it. The inquiry is, however, sometimes one of the greatest nicety, depending on various considerations, which it is now proposed to examine.

1. Cases where the donor has the legal as well as the equitable interest in the property, which is the subject of contest.

(a.) If the conveyance to the donee in trust for him be actually and effectually made, as if a person by a complete legal conveyance has transferred land or stock, no difficulty will arise, for then equity will enforce the trust even in favor of a volunteer against the author of the trust, and all subsequent volunteers.<sup>2</sup> And the rule is the same, not only if the donor has effectually conveyed the property to trustees for the donee, but also where the donor, being legal and equitable owner of property, declares himself a trustee for the donee; a binding trust is thus created. The efficacy of a simple declaration of trust is laid down by Lord Eldon in the

Has relation of  
*cestui que trust*  
been constituted?

I. Where donor  
is both legal and  
equitable owner.

(a.) Trust actually executed,—  
either  
(1) by conveyance  
or assignment  
upon trust, or  
(2) by donor's  
declaration of  
trust.

<sup>1</sup> Jones v. Lock, L. R. 1 Ch. 25.

<sup>2</sup> Ellison v. Ellison, 1 Smith, L. C. 273.

case of *ex parte Pye*,<sup>1</sup> as follows: "It is clear that this court will not assist a volunteer,—that upon an agreement to transfer stock this court will not interpose. But if the party has declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the court will act upon it."

actually executed  
—either  
(1) no declaration  
of trust, or (2) in-  
complete convey-  
ance or assign-  
ment on trust.

(b.) It often happens, however, that the donor has not made or intended to make any declaration of trust properly so called, but has attempted to make a complete legal conveyance or assignment, and has failed to do so. In considering the legal or equitable effect of such ineffectual attempts, it becomes necessary to draw the following distinctions, viz:—

(1) Of property  
assignable at  
law.

(1.) If the property in such a case is of a species that admits of a complete conveyance or assignment at law, the donee will receive no aid from the court to perfect the apparently intended gift.

A  
Smith, — indorse-  
ment under hand  
only, and pur-  
porting to as-  
sign.

Thus, in *Antrobus v. Smith*,<sup>2</sup> A. made the following indorsement upon the receipt for one of the subscriptions in the Forth and Clyde Navigation Company:—"I do hereby *assign* to my daughter B. all my right, title, and interest of and in the enclosed call, and all other calls in the F. and C. Navigation." There was no evidence that A. had parted with the paper. *Held*, that no trust was created in favor of B. The Master of the Rolls said,—“But this instrument was of itself incapable of conveying the property. It is said to amount to a declaration of trust. Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. *He was not in form declared a trustee*, nor was that mode of doing what

<sup>1</sup> *Ex parte Pye*, *ex parte Dubost*. 18 Ves. 140, 145.

<sup>2</sup> 12 Ves. 39.

he proposed in his contemplation. He meant a gift. *He says he assigns the property*, but it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift which, in the mode of making it, he has left imperfect. There is a *locus pœnitentiæ*, as long as it is incomplete."

In *Searle v. Law*,<sup>1</sup> A. made a voluntary assignment of Turnpike Bonds and Shares in a Railway Company in trust for himself for life, and after his death for his nephew. He delivered the bonds and shares to B., *but did not observe the formalities required by the Turnpike Road Act, and the deeds by which the Company was formed, to make the assignment effectual.* Held, on his death, that no interest, either in the bonds or in the shares, passed by the assignment, and that B. ought to deliver them to A's executors. The Vice-Chancellor said,—"*If that gentleman had not attempted to make any assignment of either the bonds or the shares, but had simply declared in writing that he would hold them on the same trusts as are expressed in the deed, that declaration would have been binding on him, and whatever bound him would have bound his personal representative.* But it is evident that he had no intention whatever of being himself a trustee for any one, and that he meant all the persons named in the deed as *cestui que trusts* to take the provision intended for them through the operation of that deed. *He omitted, however, to take the proper steps to make that deed an effectual assignment,* and therefore both the legal and the beneficial interest in the bonds and shares remained vested in him at his death."

*Searle v. Law*,  
—non-compliance with the particular formalities required on an assignment.

<sup>1</sup> 15 Sim. 95.

(2) Of property not assignable at law.

(2.) But if the property conveyed or assigned be not such that it may properly be transferred at law, the conveyance or assignment of it will be held good *if the donor has done all that he could to perfect the assignment.*

*Fortescue v. Barnett*,—policy of assurance, purported assignment of, by deed.

Thus in *Fortescue v. Barnett*,<sup>1</sup> J. B. made a voluntary assignment by deed of a policy of assurance upon his own life for £1000 to trustees upon trust, for the benefit of his sister and her children if she or they should outlive him. The deed was delivered to one of the trustees, but the grantor kept the policy in his own possession. No notice of the assignment was given to the Assurance Office, and J. B. afterwards surrendered, for valuable consideration, the policy and a bonus declared upon it, to the Assurance Office. Upon a bill filed by the surviving trustee of the deed to have the value of the policy replaced, the court held that, upon the delivery of the deed, no act remained to be done by the assignor to give effect to the assignment of the policy, and that he was bound to give security to the amount of the value of the policy assigned by the deed. The Master of the Rolls said,—“In the present case, the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant, if the trustees had given notice of the assignment to the Assurance Office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor, which to assist a volunteer this court would not compel him to do. *I am of opinion, that no act remained to be done to complete the title of the trustees.*”

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<sup>1</sup> 3 My. & K. 36.

In *Edwards v. Jones*,<sup>1</sup> the obligee of a bond, five days before her death, signed a memorandum not under seal, which was endorsed upon the bond, and which purported to be an *assignment* of the bond without consideration to a person to whom the bond was at the same time delivered. *Held*, that the gift was incomplete, and that as it was without consideration, the court could not give effect to it. The Lord Chancellor said,—“The transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, the question comes to be, whether the mere handing over of the bond . . . would constitute a good gift *inter vivos*; that is to say, whether the plaintiff would be entitled to the assistance of a court of equity for the purpose of carrying into effect the intention of the parties. Now, it is clear that this is a purely voluntary gift, and a gift which cannot be made effectual without the interposition of this court<sup>2</sup>.”

*Edwards v. Jones*,  
—bond purport-  
ing to be as-  
signed by memo-  
randum under  
hand only.

The cases on this subject are in no sense conflicting, provided the distinctions taken above are borne in mind. The rules regulating the matter have been clearly enunciated and applied in the case of *Pearson v. Amicable Assurance Office*.<sup>3</sup> There G. T. effected an assurance on his life with the Amicable Society. He then executed a voluntary settlement of the policy, assigning it to trustees to hold on the trusts of the voluntary settlement, and at the same time gave the trustee an irrevocable power of attorney. G. T. died, and the trustees claimed the amount from the company, but their claim was resisted by the executors, who gave notice to the office not to pay the amount to the trustees. The Assurance Company paid the money into court.

*Pearson v. Amicable Society*,—  
policy of assur-  
ance purported  
assignment of, by  
deed.

<sup>1</sup> 1 My. & Cr. 226.

<sup>2</sup> *Blakely v. Brady*. 2 Dr. & Walsh, 311; and *disting.* *Baddeley v. Baddeley*, 9 Ch. Div. 113.

<sup>3</sup> 27 Beav. 226.

The Master of the Rolls said,—“The question is, whether this is a complete instrument, or whether it requires the assistance of a court of equity for its enforcement. I am of opinion that it is a complete and perfect instrument.”

Assignment of policies, and legal choses in action.

It may here be observed that certain classes of property, not formerly assignable at law, have since the date of the foregoing decisions been made assignable at law; consequently, the distinction aforesaid between property that is, and property that is not, properly assignable at law, is for the future rendered unnecessary, and the question in all cases now is simply whether the property has been in fact completely assigned at law or only incompletely assigned at law.

II. Where donor is only equitable owner.

II. Cases where the donor has only an equitable interest in the property assigned.

(a) Trust actually executed,—either (1) by direction to trustees to hold on trust.

(a.) In this case if the settlor directs trustees to hold the property in trust for the donee, though without consideration, a trust is well and irrevocably created.<sup>1</sup> Such a direction must be in writing as regards lands; but it has been held that a direction by parol is sufficient to create a trust, as regards personal property. Thus in *M Fadden v. Jenkins*,<sup>2</sup> A. sent a verbal message to his debtor B. desiring him to hold the debt in trust for C. B. accepted the trust, and acted on it by paying C. a small part of the trust money. It was held, that a trust had attached to the property, and that the transaction amounted to the same thing, as if A. had declared himself, instead of B., a trustee of the debt for the plaintiff.

Parol declaration of trust binds personality.

Notice to trustee unnecessary except as against third parties.

It does not now seem to be considered necessary to the validity of the creation of a trust by the beneficial owner of property, that there should be no-

<sup>1</sup> Bill v. Cureton, 2 My. & K. 503.

<sup>2</sup> 1 Ph. 153.



tice to, or an acceptance, or declaration of the trusts by, the trustees in whom the legal interest is vested;<sup>1</sup> notice is, however, necessary to protect the *cestui que trust* as against third parties.<sup>2</sup>

(b.) Cases where, instead of giving directions to trustees to hold for the benefit of volunteers, the donor assigns his equitable interest without consideration to another.

Or (2) by conveyance or assignment of equitable interest.

Two groups of cases occur under this head:

- (1.) Lands,—equitable interest in;
- (2.) Personalty,—equitable interest in.
- (1.) Lands,—equitable interest in:—

In *Gilbert v. Overton*,<sup>3</sup> a settlor, holding an agreement for a lease, subject to rents and covenants, by voluntary deed, assigned all his interest to trustees, to hold upon the trusts thereby declared, and shortly afterwards took a lease under the agreement to himself. The legal estate was never assigned to the trustees. It did not appear, whether at the date of the settlement the settlor was entitled to call for an immediate lease. *Held*, that the settlement was complete, and ought to be carried into execution. In giving judgment, Lord Hatherley, then Vice-Chancellor, said,—“It appears to me there are several reasons for upholding the settlement. In the first place, it contains a declaration of trust, and that is all that is wanted to make any settlement effectual. The settlor conveys his equitable interest, and directs the trustees to hold it upon the trusts thereby declared. In the inception of the transaction, there is nothing to show that the settlor had the power of obtaining a lease before the time when he did so, after the exe-

*Gilbert v. Overton*—lands, assignment of equitable interest in, by deed.

<sup>1</sup> *Tierney v. Wood*, 19 Beav. 330; *Donaldson v. Donaldson*, Kay, 711; *Kronheim v. Johnson*, 7 Ch. Div. 60.

<sup>2</sup> *Donaldson v. Donaldson*, Kay, 719.

<sup>3</sup> 2 H. & M. 110.

cution of the settlement. There is, therefore, nothing to show that the settlor did not, by the settlement, do all that it was in his power to do, to pass the property. If this were not sufficient, it would be impossible to make a voluntary settlement of property of this description.<sup>1</sup>

(2.) Personalty,—equitable interest in :—

As to personalty, there has been undoubtedly some uncertainty of opinion arising from the principle of the common law, [recently altered by statute],—“that choses in action are not assignable;” but since the case of *Kekewich v. Manning*,<sup>2</sup> the doctrine laid down in *Meek v. Kettlewell*,<sup>3</sup> which was supposed to conflict with the other cases, has been explained, and the weight of all recent authority tends to show that the rule in the case of equitable interests in personalty is the same as that which was pointed out with regard to equitable interests in realty in *Gilbert v. Overton*,<sup>4</sup> viz : that the settlement will be upheld where the settlor has done all in his power to pass the property.

*Kekewich v. Manning*,—personal estate, equitable interest in, assignment of, by deed.

In *Kekewich v. Manning*,<sup>5</sup> residuary estate, consisting of money in the funds, was bequeathed to a mother and daughter, in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of her marriage, the daughter assigned her interest under the will to trustees upon trust for the issue of the intended marriage, and in default for a niece of the daughter, and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a

<sup>1</sup> But see *Bridge v. Bridge*, 16 Beav. 322.

<sup>2</sup> 1 DeG., M. & G. 176.

<sup>3</sup> 1 Hare, 464.

<sup>4</sup> 2 H. & M. 116; *May on Voluntary Conveyances*, p. 409.

<sup>5</sup> *Ubi supra*.

party to the settlement, but had notice of it before the husband's death. *Held*, that (even if the settlement was voluntary as regarded the trust in favor of the niece) it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement, against the daughter, and against the trustees of another settlement, which she made on a second marriage, inconsistent with the former settlement. Knight Bruce, L. J., said,—“To state, however, a simple case—suppose stock or money to be legally vested in A. as trustee for B. for life; and subject to B's life interest for C. absolutely; surely it must be competent to C., in B's lifetime, with or without the consent of A., to make an effectual gift of C's interest to D., by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. If so, can C. do this better or more effectually than by executing an assignment to D. ?”

In *Donaldson v. Donaldson*,<sup>1</sup> it was held that a voluntary assignment of the assignor's interest in a sum of stock standing in the names of trustees, such assignment being made by *deed* of trust in favor of volunteers, was a complete transfer of such interest, as between the donee and the representative of the donor, although no notice of the deed was given to the trustees in the donor's lifetime. Wood, V. C., said,—“The question is, in every case where there has been no declaration of trust, Has the assignor performed such acts that the donee can take advantage of them, without requiring any further act to be done by the assignor, and if the title is so far complete, this court will assist the donee in obtaining the property from any person who would be treated as a trustee for him? . . . In this case there is no need whatever for the donee

*Donaldson v. Donaldson*,—to same effect.

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<sup>1</sup> Kay, 711.

to call in aid the jurisdiction of this court against the original assignor or his representatives. All that they have to do, is to require the trustees who hold the fund, to transfer it to them.”<sup>1</sup>

Donor's intention to constitute himself a trustee may be gathered from conduct without any express declaration as regards personal estate at least.

The relation of trustee and *cestui que trust*, may be created in various ways, and we have seen that it may arise by simple writing under hand signed by the party declaring or directing the trust, or (but only as to pure personal estate) by mere word of mouth declaring or directing the same. And, further, as regards pure personal estate, it is not essential even that there should be any express declaration or direction of trust, but the intention of the donor to constitute himself a trustee, or to direct a third person to hold upon trust, may be gathered from the mere conduct of the party, or the facts and circumstances of the case. Thus, in the recent case of *Penfold v. Mould*,<sup>2</sup> a married woman entitled to certain sums of stock and cash standing in court to her separate account, consented that the same should be transferred to her husband, and afterwards retracted her consent. It was there argued, and the argument was approved by the court, that such consent might constitute a valid declaration of trust; but on the whole case it was decided that a trust had not been created, inasmuch as it was competent for a married woman to retract her consent at any time before the transfer was actually completed.

*Milroy v. Lord*,—  
summary of the

The law as to voluntary trusts is thus summarised by Lord Justice Turner in *Milroy v. Lord*:<sup>3</sup>

“In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property

<sup>1</sup> See *Re Way's Settlement*, 13 W. R. 149.

<sup>2</sup> L. R. 4 Eq. 562.

<sup>3</sup> 4 DeG., F. & J. 264.

comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual, if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol.

(b.) "But in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to *perfect an imperfect gift*." Where, therefore, the facts show an intention to transfer property, and not to declare a trust, the court will not give effect to an imperfect transfer by treating it as a declaration of trust.<sup>1</sup>

Thirdly,—A conveyance upon trust may (or may not) be fraudulent, and ineffectual (or effectual) accordingly. Further, various species of frauds, arising either at common law or under the provisions of particular statutes, have to be considered, and principally in connection with marriage settlements, in order to determine whether the settlement (being otherwise good and perfect) is to stand or fall. We propose to indicate the principal provisions of the statutes.

(a.) By the *statute* 13 Eliz., c. 5, all covinous conveyances, gifts, alienations of lands or goods, whereby *creditors* might be in any wise disturbed, hindered, delayed, or defrauded of their just rights, are declared *utterly void*, but the act is not to ex-

(b) Trust not actually executed,—either (1) by direction to trustees, or (2) by conveyance or assignment of equitable interest.

III. *Fraudulent trusts*,—principally in relation to marriage.

(a) 13 Eliz., c. 5,—frauds under.

<sup>1</sup> Milroy v. Lord, 4 DeG., F. & J. 264; Warriner v. Rogers, L. R. 16 Eq. 340; Richards v. Delbridge, 22 W. R. 584.

tend to any estate, or interest in lands, etc., *on good consideration* and *bona fide* conveyed to any person not having notice of such covin.

Settlement must be both on good consideration and *bona fide*.

This statute does not declare all voluntary conveyances to be void, but only all fraudulent conveyances to be void,<sup>1</sup> and whether a conveyance be fraudulent or not, is declared to depend upon its being made upon good consideration and *bona fide*. It is not sufficient that it be upon good consideration or *bona fide*. It must be both; and, therefore, if a conveyance or gift be defective in either particular, although it is valid between the parties and their representatives, yet it is utterly void as to creditors.<sup>2</sup>

Voluntary conveyances not necessarily fraudulent under 13 Eliz., c. 5.

The word "voluntary" is not to be found in the statute 13 Eliz., c. 5. A voluntary conveyance may therefore, be made of real or personal property, without any consideration whatever, and can not be avoided, at least under that statute, by subsequent creditors, unless it be of the description mentioned in the statute.<sup>3</sup>

Settlor being indebted does not *per se* invalidate conveyance.

It was for some time thought that the mere fact of the settlor being indebted at the time of his voluntary conveyance, was sufficient to invalidate that conveyance under the statute in favor of creditors, and certain dicta of Lord Westbury, in *Spirett v.*

Doctrine in *Spirett v. Willows* stated.

*Willows*,<sup>4</sup> were supposed to support that view. It was there said, "that if the debt of the creditor by whom the voluntary conveyance is impeached *existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement*, it is immaterial

<sup>1</sup> *Holloway v. Millard*, 1 Mad. 414.

<sup>2</sup> *Story*, 353; but see *Middleton v. Pollock*, *Ex parte Elliott*, L. R. 2 Ch. Div. 104.

<sup>3</sup> *Holloway v. Millard*, 1 Mad. 419.

<sup>4</sup> *DeG. J. & S.* 293; 34 L. J. Ch. 367.

whether the debtor was or was not solvent after making the settlement." His Lordship meant, of course, that, having shown so much, you had shown enough, and it was not necessary to go on and show further that the settlor was also insolvent.

The principle laid down in *Spirett v. Willows* <sup>*Freeman v. Pope*  
—extension of  
decision in *Spirett*  
*v. Willows.* †</sup> has been reconsidered and approved, and also extended, in the recent case of *Freeman v. Pope*.<sup>1</sup>

The bill there was filed for the administration of the estate of A., and to set aside a voluntary settlement executed by him some years previous to his death, *by a creditor whose claim had accrued since the date of the settlement*. It was proved that A. was perfectly solvent up to the date of the settlement, but that the effect of the settlement was to deprive him of the means of paying certain then existing debts. Lord Hatherley, in deciding against the validity of the settlement, after reviewing the authorities, stated the law to be that in the absence of direct proof of intention to defraud, if a person owing debts made a settlement which subtracted from the property which was the proper fund for payment of those debts, an amount without which the then existing debts could not be paid, then the law would presume an intention to defeat and delay creditors, such as to bring the case within the statute. In other words, the subsequent creditors, upon showing in effect that the money lent by them must have been applied towards paying the former creditors who were in existence at the date of the settlement, but had subsequently been paid off, were decided to have an equity to "stand in the shoes" of the previously existing creditor, for the purpose of impeaching the settlement.

The question as to what amount of indebtedness <sup>What amount of  
indebtedness will  
raise presump-  
tion of fraudulent</sup> will raise the presumption of fraudulent intent,

<sup>1</sup> L. R. 5 Ch. 538; and see *Taylor v. Coenen*, L. R. 1 Ch. Div. 636.

intent, within the  
meaning of 13  
Eliz., c. 5.

within the meaning of the statute 13 Eliz., c. 5, is one of evidence to be decided upon the facts of each case. Mere indebtedness will not suffice, nor, on the other hand, is it necessary to prove absolute insolvency. To quote the words of Lord Hatherley, when Vice-Chancellor, in *Holmes v. Penney*:<sup>1</sup>—“The settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who at the time of making the settlement were creditors of the settlor.”<sup>2</sup> In other words, the settler must either have been already insolvent, *i. e.*, embarrassed, at the date of the settlement, or must have become immediately embarrassed in consequence thereof.<sup>3</sup>

(b.) 27 Eliz., c. 4,—  
frauds under.

(b.) The statute 27 Eliz., c. 4, was enacted for the protection of *purchasers*, as the statute 13 Eliz., c. 5, was for that of creditors. It enacts that every conveyance, grant, charge, lease, limitation of use, of, in, or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, etc., as shall purchase the said land, or any rent or profit out of the same, shall be deemed, but only as against such persons, their heirs, etc., who shall so purchase for money or any good consideration the said lands, etc., to be *wholly void*, frustrate, and of none effect.

Voluntary settle-  
ment void against  
subsequent pur-  
chaser.

A voluntary settlement of lands made in consideration of natural love and affection is void, as against a subsequent purchaser of the same lands

<sup>1</sup> 3 K. & J. 90; *Townsend v. Westacott*, 2 Beav. 340.

<sup>2</sup> See Story on Eq., 362-365, where the English and the American decisions on this point are fully reviewed and compared. See also May on Voluntary Conveyances, 41-47.

<sup>3</sup> *Sexton v. Wheaton*, 5 Wheat. 229.]



for valuable consideration, even though with notice,<sup>1</sup> for the very execution of a subsequent conveyance sufficiently evinces the fraudulent intent of the former one. The voluntary settlement is, however, good as against the grantor, who therefore cannot compel specific performance of a subsequent contract for sale of lands so settled,<sup>2</sup> though the purchaser from him can.<sup>3</sup>

Chattels personal, in which respect they differ from chattels real, are not within the statute 27 Eliz., c. 4, and, therefore, a voluntary settlement of chattels personal cannot be defeated by a subsequent sale.<sup>4</sup> And even as regards chattels real, *i. e.*, leasehold properties, the recent decisions tend to this result, that if the volunteer undertakes the onerous covenants comprised in the loan, he is not in fact a volunteer.<sup>5</sup>

A mortgagee,<sup>6</sup> and likewise a lessee, is a purchaser within the meaning of the statute; but a judgment creditor is not so.<sup>7</sup>

It has been decided not only that a *bona fide* purchaser for value from the heir-at-law or devisee of one who has made a voluntary conveyance is not within the statute, but also that a person who purchases for value from one claiming under a second voluntary conveyance, or from any other than the

Chattels personal  
not within the  
statute.

Purchaser—who.

Subsequent pur-  
chase must be  
from the very  
settlor himself.

<sup>1</sup> Doe v. Manning, 9 East, 59.

<sup>2</sup> Smith v. Garland, 2 Mer. 123.

<sup>3</sup> Daking v. Whimper, 26 Beav. 568.

<sup>4</sup> Bill v. Cureton, 2 My. & K. 503; M'Donnell v. Hesilrige, 16 Beav. 346.

<sup>5</sup> Saunders v. Dehew, 2 Vern. 272; Price v. Jenkins, L. R. 4 Ch. Div. 483; Gale v. Gale, L. R. 6 Ch. Div. 144. See also Ex parte Doble, In re Doble, 26 W. R. 407; Ex parte Hillman, In re Pumfrey, 10 Ch. Div. 622.

<sup>6</sup> Chapman v. Emery, Cowp. 279; Cracknall v. Janson, 11 Ch. Div. 1.

<sup>7</sup> Beavan v. Earl of Oxford, 6 De G. M. & G. 507.

person who made the voluntary conveyance in his lifetime, is equally excluded from the benefit of the statute.<sup>1</sup>

*Bona fide purchaser under 13 Eliz., c. 5, and 27 Eliz., c. 4.*

In 27 Eliz., c. 4, s. 4, there is a proviso, similar to that in 13 Eliz., c. 5, s. 5, in favor of a *bona fide* purchaser, that that act shall not extend to or be construed to defeat any conveyances, etc., of lands made upon or for good consideration, and *bona fide* to any person.

*Bona fide purchasers, definition of.*

*Bona fide* purchasers are such as take *bona fide*, and for a valuable consideration. And this leads us to the inquiry, What is a valuable consideration under this statute? Lawful considerations generally may be divided into two classes:

Considerations are either (1.) Meritorious;

1. Meritorious or good considerations import a consideration of blood or natural affection, as when a man grants an estate to a near relation; or they are founded merely upon motives of generosity, prudence and natural duty. Such considerations standing alone will not avail to support a conveyance as against a subsequent purchaser for value.

Or (2.) Valuable.

2. Valuable considerations are *money, marriage*, or the like, which the law esteems an equivalent for money.

*Marriage consideration under 27 Eliz., c. 4.*

The consideration of marriage has always been recognized by courts of law and equity as a valuable one; and previous to the Statute of Frauds a mere promise by the intended husband to settle property upon the intended wife was upheld by the subsequent marriage. The Statute of Frauds, 29 Car. II., c. 3, s. 4, did not change the principle, but only required an additional circumstance by way of evidence,—that such ante-nuptial agreement should be in writing, in order that it should bind

<sup>1</sup> Doe v. Rusham, 17 Q. B. 723; Lewis v. Rees, 3 K. & J. 132; Richards v. Lewis, 11 C. B. 1035; General Meat Supply Association v. Bouffler, W. N. 1879, 26.

the husband, or other the party signing it. In the case, therefore, of an ante-nuptial agreement followed by marriage, the wife becomes a purchaser within the statute 27 Eliz., c. 4.<sup>1</sup>

It appears also that a post-nuptial settlement, made in pursuance of an ante-nuptial parol agreement, is good as against a subsequent purchaser for value although without notice, under the 27 Eliz., c. 4;<sup>2</sup> although a mere post-nuptial settlement, without any ante-nuptial agreement, is void under that statute as against a subsequent purchaser for value, even with notice.<sup>3</sup>

But though a post-nuptial voluntary settlement made by the husband or wife, and not in pursuance of ante-nuptial agreement, is within the provisions of the 27 Eliz., c. 4, and is void against a subsequent purchaser of that estate, still a court of equity is willing to support such a post-nuptial settlement on very slight consideration. Thus, in *Hewison v. Negus*,<sup>4</sup> it was decided that if the wife's real estate, of which her husband would be entitled to receive the rents and profits during her coverture, be settled by post-nuptial settlement on her for life, for *her separate use*, &c., with remainder to the children, the post-nuptial settlement is not void under the 27 Eliz., c. 4, as against a subsequent purchaser from the husband and wife. "I concur," said the Master of the Rolls, "with the

Post-nuptial settlement in pursuance of ante-nuptial parol agreement.

*Bona fide* post-nuptial settlement supported on slight consideration.

<sup>1</sup> *Kirk v. Clark*, Prec. in Ch. 275.

<sup>2</sup> *Dundas v. Dutens*, 2 Cox, 235; *Spurgeon v. Collier*, 1 Eden, 55; *Warden v. Jones*, 2 De G. & J. 76; and see the principle in *Bailey v. Sweeting*, 9 C. B., N. S., 843; 30 L. J. C. P. 150. But see *Trowell v. Shenton*, 8 Ch. Div. 318.

<sup>3</sup> *Butterfield v. Heath*, 15 Beav. 408; *Warden v. Jones*, 2 De G. & Jo. 76.

<sup>4</sup> 16 Beav. 594; and see *Bayspoole v. Collins*, L. R. 6 Ch. App. 228; *Teasdale v. Braithwaite*, L. R. 4 Ch. Div. 85, and 5 Ch. Div. 630; *In re Foster v. Lister*, L. R. 6 Ch. Div. 87.

argument which was urged, that the surrender by the husband of his right to receive the rents and profits of the hereditaments during coverture, and his giving his wife a sole and exclusive power and control over them, is a valuable consideration sufficient to support this settlement." The husband was a purchaser on behalf of his children, giving up his own life estate, in consideration of the estates limited to his children. And, *semble*, a *bona fide* post-nuptial settlement of leasehold properties, subject to onerous covenants, is not a voluntary settlement.<sup>1</sup>

*Mala fide* pre-nuptial settlement not supported.

And conversely, even an ante-nuptial voluntary settlement, for which the marriage is the sole consideration on the part of the wife, will not be supported as against a subsequent purchaser, if the marriage is in effect no consideration emanating from the wife. Thus, in *Colombine v. Penhall*,<sup>2</sup> a gentleman went through a valid ceremony of marriage with a female who had previously given herself to him in concubinage for a period of years; and he settled considerable property upon her prior to and in purported consideration of the marriage. The court being, however, of opinion that the female in question had not given, as a consideration for the marriage, anything she had not already previously given for nothing or for some other consideration, and that she was aware of the real character of the transaction, set aside the settlement as fraudulent against a subsequent purchaser.

Who are within the scope of the marriage consideration.

There have been some cases in which the question has been, how far the consideration of marriage will extend, and whether limitations in favor of very remote objects may not be void as against subse-

<sup>1</sup> *Ex parte Doble, in re Doble*, 26 W. R. 407, affirmed and explained in *Ex parte Hilman, in re Pumfrey*, 10 Ch. Div. 622.

<sup>2</sup> Sm. & G. 228.

quent purchasers. A limitation to the issue of the settlor by a second marriage was held *not* to be voluntary.<sup>1</sup> So a settlement on her marriage, made by a woman of her property, as a provision for her illegitimate child, was upheld as against a subsequent mortgagee.<sup>2</sup> But a limitation to the brothers of a settlor was held voluntary.<sup>3</sup>

But limitations in favor of collaterals will be supported if there be any party to the settlement who purchases on their behalf.<sup>4</sup>

Fourthly,—Conveyances upon trust may be upon trust for creditors. And to the general rule that a declaration of trust in favor of volunteers by the legal or equitable owner of realty or of personalty is irrevocable, there is an important exception in the class of cases where a debtor, without the knowledge of his creditors, makes a transfer of property to trustees for payment of his debts. Such a transaction does not invest creditors with the character of *cestui que trusts*, but amounts merely to a direction to the trustees as to the mode in which they are to apply the property vested in them, for the benefit of the owner of the property, the debtor, who alone stands to them in the relation of *cestui que trust*, and can vary or revoke the trusts at pleasure.<sup>5</sup> In *Walwyn v. Coutts*,<sup>6</sup> a father conveyed his estates to trustees for paying off annuities granted by his son, together with the arrears,

IV. *Trusts in favor of creditors,—*  
irrevocable, as a  
general rule.

Amounts to a  
mere direction to  
trustees as to  
mode of disposition.

<sup>1</sup> *Clayton v. E. of Winton*, 3 Mad. 302, n; *Newstead v. Searles*, 1 Atk. 265.

<sup>2</sup> *Clark v. Wright*, 6 H. & N. 849; see *Price v. Jenkins*, L. R. 4 Ch. Div. 483; *Gale v. Gale*, L. R. Ch. Div. 144.

<sup>3</sup> *Johnson v. Legard*, 6 M. & S. 60; *Stackpoole v. Stackpoole*, 4 Dru. & Warr. 320.

<sup>4</sup> *Heap v. Tonge*, 9 Hare, 104; *Pulvertoft v. Pulvertoft*, 18 Ves. 92. See also *Brown's Law Dictionary*--title *Marriage Settlement*.

<sup>5</sup> *May on Voluntary Conveyances*, p. 397.

<sup>6</sup> 3 Sim. 14 [and see *Garrard v. Lauderdale*, 3 Sim. 1.]

and also his son's debts, if they thought proper. The annuitants were mentioned in a schedule, but were neither parties nor privies to the deed. The father and son then executed other deeds varying the former trusts. A motion by one of the scheduled creditors to restrain the trustees from executing the trusts of the subsequent deeds until they performed the trusts of the first was refused.

American rule,  
trust not revocable.

[In the United States a different rule prevails. The assent of the creditor is presumed to be given to a trust created for his benefit, and after such assent the trust is not revocable by the grantor.<sup>1</sup> But this presumption of the creditor's assent may be rebutted by his conduct.<sup>2</sup>]

Effect of the creditor being a party to the deed.

Where a creditor is party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debts due to that creditor, the deed is as to that creditor irrevocable.<sup>3</sup>

A creditor who for a long time delays,<sup>4</sup> or sets up a title adverse to the deed,<sup>5</sup> will not be allowed to claim the benefit of its provisions; as neither will any creditor to whom the existence of the deed has never been communicated, *semble*.<sup>6</sup>

V. *Equitable Assignments*.

Closely allied with the subject of assignments to trustees in favor of creditors, is that of equitable assignments, so called, directly to creditors.

General rule of the old common law.

"The great wisdom and policy of the sages and founders of our law," says Lord Coke, "have provided that no possibility, right, title, nor thing in

[<sup>1</sup> *Moses v. Mungatroyd*, 1 Johns. Ch. 119; *Ward v. Lewis*. 4 Peck. 518.]

[<sup>2</sup> *Gibson v. Rees*, 50 Ill. 383.]

[<sup>3</sup> *Mackinnon v. Stewart*, 1 Sim. N. S. 88; *La Touche v. Earl of Lucan*, 7 C. & F. 772; *Montefiore v. Brown*, 7 H. L. Cas. 241 266.

[<sup>4</sup> *Gould v. Robertson*, 4 De G. & Sm. 509.

[<sup>5</sup> *Watson v. Knight*, 19 Beav. 369.

[<sup>6</sup> *Johns v. James*, 8 Ch. Div. 744.

action, shall be granted or assigned to strangers; for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice."

The reasons given by Lord Coke for this rule of law which prevents the assignment of a possibility or chose in action, have been almost wholly disregarded by courts of equity; and, accordingly, from a very early period, assignments of a mere naked possibility, or of a chose in action, for valuable consideration, have been held valid in equity, which will carry them into effect upon the same principle that it enforces the performance of an agreement, when not contrary to its own rules or public policy.<sup>1</sup> A mere expectancy, therefore, as that of an heir-at-law to the estate of an ancestor,<sup>2</sup> or the interest which a person may take under the will of another then living,<sup>3</sup> non-existing property to be acquired at a future time as the future cargo of a ship,<sup>4</sup> is assignable in equity for valuable consideration; and where the expectancy has fallen into possession, the assignment will be enforced.<sup>5</sup>

In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, has always been considered a binding equitable assignment or (speaking accurately) appropriation of so much money.

Thus, in *Burn v. Carvalho*,<sup>6</sup> A. having goods in the hands of B. as his agent at a foreign port, and being under liabilities, to C., by letter to C. prom-

Respects in which equity infringed upon the rule of the old common law.

Order given by debtor to his creditor upon a third person, a good equitable assignment, i.e., appropriation.

<sup>1</sup> *Squib v. Wyn*, 1 P. Wms. 378.

<sup>2</sup> *Hobson v. Trevor*, 2 P. W. 191.

<sup>3</sup> *Bennet v. Cooper*, 9 Beav. 252.

<sup>4</sup> *Lindsay v. Gibbs*, 22 Beav. 522.

<sup>5</sup> *Holroyd v. Marshall*, 10 H. L. Cas. 191.

<sup>6</sup> 4 My. & Cr. 690.

ised that he would direct, and, by subsequent letter to B., did direct B. to deliver over the goods to D. as the agent of C. at that port. Before the delivery of the goods, a commission of bankrupt issued against A. under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy. *Held*, that C. had a good title in equity to the goods.

Again, in *Diplock v. Hammond*,<sup>1</sup> A. having obtained a loan from B., gave him the following instrument addressed to his (A's) debtor:—"I hereby authorize you to pay £365, being the amount of my contract, B. having advanced me that sum." *Held* a valid equitable assignment.<sup>2</sup>

mandate from  
principal to agent  
—confers no right  
on the creditor.

A mere mandate from a principal to his agent, not communicated to a third person, will give him no right or interest in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit.<sup>3</sup> Such a mandate is clearly no appropriation or equitable assignment of property in favor of a creditor. Thus, in *Rodick v. Gandell*,<sup>4</sup> a railway company was indebted to the defendant, their engineer, who was greatly indebted to his bankers. The bankers having pressed for payment or security, the defendant, by letter to the *solicitors* of the company, authorized them to receive the money due to him from the company, and requested them to pay it to the bankers. The solicitors, by letter, promised the bankers to pay them such money, *on raising it*.

<sup>1</sup> 2 Sm. & G. 141; 5 De G. M. & G. 320.

<sup>2</sup> Farquhar v. City of Toronto, 12 Gr. 186.

<sup>3</sup> Morrell v. Wootten, 16 Beav. 179.

<sup>4</sup> 1 De G. M. & G. 763. And see *Ex parte, Hall*, in re Whitting 10 Ch. Div. 615.



*Held*, that this did not amount to an equitable assignment of the debt. "The extent of the principle," said Lord Truro, "to be deduced from the cases is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers. I think that a decision that the authority to the solicitors contained in the letter, to receive the debt due from the railway company, and to pay what should be received to the bank, operated as an assignment in equity of the railway debt, would be to extend the principle much beyond the warrant of the authorities. If an assignment of the debts had been intended, it would have been quite as easy to have directed the order to the railway company as to the solicitors. It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have been ascertained, and some definite portion been adjusted and realized."

In order that third parties may be bound, it is necessary, with regard to a chose in action, for the assignee, to do all that can be done to perfect the assignment, to do everything towards having possession, which the subject admits; to do "that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as his property. For this purpose he must give notice to the legal holder of the fund: in the case of a debt, for instance, notice to the debtor is for many pur-

Notice to legal holder by assignee of chose in action necessary to perfect title,—as against third person.

Such notice is tantamount to possession.

poses tantamount to possession. If he omit to give that notice, he is guilty of the same degree and species of neglect as he who leaves a personal chattel to which he has acquired a title, in the actual possession, and under the absolute control, of another person." Notice, then, is necessary to perfect the title, to give a complete right *in rem*, and not merely a right as against him who conveys his interest. If the assignee is willing to trust the personal credit of the man, and is satisfied that he will make no improper use of the possession in which it is allowed to remain, notice is not necessary, for against him the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before the assignee's pocket-conveyance is notified to them, the assignee must be postponed. On being postponed, the assignee's security is not invalidated; he had priority, but that priority has not been followed up; he has permitted another to acquire a better title to the legal possession.<sup>1</sup> Where an assignee has done all in his power towards taking possession, he will not lose his priority.<sup>2</sup>

And gives a right *in rem*.

Assignee of chose in action takes subject to equities.

The assignee of a chose in action, although without notice, in general takes it subject to all the equities which subsist against the assignor. Thus, in *Turton v. Benson*,<sup>3</sup> where a son on his marriage was to have from his mother, as a portion with his wife, exactly as much as his intended father-in-law

<sup>1</sup> Ryall v. Rowles, 2 Sm. L. C. 729; Dearle v. Hall, 3 Russ. 1; *In re Freshfield's Trust*, 11 Ch. Div. 198; Buller v. Plunkett, 1 J. & H. 441.

<sup>2</sup> Feltham v. Clark, 1 De G. & Sm. 307; Langton v. Horton, 1 Hare, 549.

<sup>3</sup> 1 P. Wms. 496; and see Judicature Act, 1873, 36 & 37 Vict., c. 66, sec. 25, sub-sec. 6.

should allow to his daughter, and privately, without notice to his mother, who treated for the marriage, gave a bond to the wife's father to pay back £1000 of the wife's portion seven years after, in consideration that the father-in-law should make the wife's portion £3000, instead of (as he had intended) £2000 only; and the bond was afterwards assigned for the benefit of the creditors of the father-in-law; it was held that the bond being void in equity in the hands of the father-in-law, could not be made better by the assignment,<sup>1</sup> in the hands of the creditors, although taken without notice of the son's fraud.

But though this rule generally holds good, it has been observed that length of time and other circumstances may make the case of the assignee stronger;<sup>2</sup> and further, the equities affecting the assignor must be in respect of the very chose in action itself; and, moreover, an exception to the rule occurs in the case of negotiable instruments, <sup>Exception as to negotiable instruments.</sup> "because if the rule were otherwise," Lord Keeper Somers observed, "it would tend to destroy trade, which is carried on everywhere by bills of exchange, and he would not lessen an honest creditor's security."<sup>3</sup> And the rule will yield in equity where a contrary intention appears from the nature and terms of the contract between the original contracting parties. Thus, debentures made payable <sup>And as to debentures payable to bearer.</sup> to bearer were held to bind the company issuing

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<sup>1</sup> *Barnett v. Sheffield*, 1 De G. M. & G. 371; *Athenæum Life Assurance Society v. Pooley*, 3 De G. & J. 294; *Graham v. Johnson*, L. R. 8 Eq. 36.

<sup>2</sup> *Hill v. Caillovel*, 1 Ves. Sr. 123; *Ex parte Chorley*, L. R. 11 Eq. 157.

<sup>3</sup> *Anon. Com. Rep.* 43; and see *Beckervaise v. Lewis*, L. R. 7 C. P., 372.

them, in the hands of transferees for value, irrespective of any equities between the company and the original holders.<sup>1</sup>

Assignments contrary to public policy.

As in the case of agreements, a court of equity will not, upon the ground of public policy, give effect to assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of their official duties. Thus the pay of an officer in the army,<sup>2</sup> and the salary of a judge given to him to support the dignity of his office, have been held not assignable; but, *semble*, such assignments are valid when the office is a sinecure or the duties have ceased.<sup>3</sup>

Assignments affected by champerty and maintenance.

Courts of equity, on principles of public policy, will not give effect to assignments which partake of the nature of champerty, or maintenance, or buying of pretended titles.<sup>4</sup> Thus, in *Stevens v. Bagwell*,<sup>5</sup> one-fifth part of the share of prize money, the subject of a suit *then depending* in the Admiralty Court, was assigned by the executrix of one of the captors, and her husband, to a navy agent, in consideration of his indemnifying them from all costs on account of any suit touching the said prize money, and paying to them the remaining four-fifths, if it should be recovered. *Held*, that the assignment was void as amounting to that species of maintenance which is called champerty, viz., the

<sup>1</sup> *In re Blakeley Ordinance Company*, L. R. 3 Ch. App. 154. *In re General Estates Company*, Ib. 758. But see *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374.

<sup>2</sup> *Stone v. Liddedale*, 2 Anst. 533.

<sup>3</sup> *Arbuthnot v. Norton*, 5 Moore's P. C. C. 219; *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 550; *Willcock v. Terrell*, 3 Exch. Div. 323.

<sup>4</sup> *Reynell v. Spyre*. 1 De G, M. & G. 660.

<sup>5</sup> 15 Ves. 139.

unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it.<sup>1</sup>

Upon the same principle of not giving any encouragement to litigation, especially when undertaken as a speculation, equity will not enforce the assignment of a mere naked right to litigate, *i. e.*, which, from its very nature, is incapable of conferring any benefit except through the medium of a suit, such as a mere naked right to set aside a conveyance for fraud.<sup>2</sup>

But the purchase of an interest *pendente lite*,<sup>3</sup> or a mortgage *pendente lite*,<sup>4</sup> or the advance of money for carrying on a suit, if the parties have a common interest,<sup>5</sup> or if there exists between the parties the relation of father and son,<sup>6</sup> or master and servant,<sup>7</sup> will not be considered as maintenance or champerty.<sup>8</sup> Moreover, a purchase from the defendant is always valid, he having the possession, and therefore something more than a *mere* right of action.

A purchase by an attorney, *pendente lite*, of the subject-matter of the suit is invalid;<sup>9</sup> and an undischarged bankrupt's assignment of his expectation of a surplus, in the administration of his estate, does not confer on the assignee any right to interfere in that administration.<sup>10</sup>

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<sup>1</sup> Earle v. Hopwood, 9 C. B. (N. S.) 566.

<sup>2</sup> Prosser v. Edmonds, 1 Y. & C. Exch. Ca. 481; Powell v. Knowler, 2 Atk. 226; In re Paris Skating Rink Co., L. R. 5 Ch. Div. 959.

<sup>3</sup> Knight v. Bowyer, 2 De G. & J. 421, 455.

<sup>4</sup> Cockell v. Taylor, 15 Beav. 123, 117.

<sup>5</sup> Hunter v. Daniel, 4 Hare, 420.

<sup>6</sup> Burke v. Greene, 2 Ball & B. 521.

<sup>7</sup> Wallis v. D. of Portland, 3 Ves. 503.

<sup>8</sup> Dickinson v. Burrell, 14 W. R. 412.

<sup>9</sup> Simpson v. Lamb, 7 Ell. & Bl. 84; Anderson v. Radcliffe, 6 Jur., N. S. 578.

<sup>10</sup> Ex parte Sheffield, in re Austin, 10 Ch. Div. 434.

VI. *Trusts—how created.*

Sixthly,—It remains to consider the constituents of a valid trust, or the elements required for its creation. Now, no particular form of expression is necessary to the creation of a trust, if, on the whole, it can be gathered that a trust was intended. There are many cases, arising chiefly under wills, in which it is very difficult to determine whether or not a trust was intended to be created. “As a general rule,” observes Lord Langdale, “it has been laid down that when property is given absolutely to any person, and the same person is by the giver who has power to command, recommended, or entreated, or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish shall be held to create a trust:—

The three certainties.

“*First*, If the words are so used that on the whole they ought to be construed as imperative or certain;

“*Secondly*, If the subject-matter of the recommendation or wish be certain.

“*Thirdly*, If the objects or persons intended to have the benefit of the recommendation or wish be also certain.

“For example,—If a testator gives £1000 to A., desiring, wishing, recommending, or hoping that A. will, at his death, give the same sum, or any part of it, to B., it is considered that B. is an object of the testator’s bounty, and A. a trustee for him. No question arises on the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish.

“So, again, if a testator gives the residue of his estate, after certain purposes are answered, to A., recommending A., after his death, to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained, and the

relations to be selected, though persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable, so capable of being made certain, that the rule is applicable to such cases, and that a valid trust is created.

“On the other hand, if the giver accompanies his expression of wish or request by other words from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any definite part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus, the words ‘free and unfettered,’ accompanying the strongest expression of request, were held to prevent the words of request being imperative. Any words by which it is expressed, or from which it may be implied, that the first taker may apply any indefinite part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interests the objects are to take, will prevent the object from being certain within the meaning of the rule, and in such cases we are told that the question ‘never turns upon the grammatical import of words—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent, must be considered.’”<sup>1</sup>

No trust if there is a want of any one or more of the “three certainties.”

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<sup>1</sup> Knight v. Knight, 3 Beav. 172; 11 C. & F. 513; Meggison v. Moore, 2 Ves. Jr. 632; Bernard v. Minshull, Johnson, 276; *In re Bond*, Cole v. Hawes, L. R. 4 Ch. Div. 238.

(1.) Recommendation must be imperative, i. e., certain.

*Firstly*, The words of recommendation used must be such that, upon the whole, they ought to be construed as imperative. No technical words are necessary, but the testator's intent is to be carried out, and his words "willing or desiring" that the person on whom he has conferred property should make a disposition of it in favor of certain objects, if reasonably certain, will be construed as imperative, and amount to a trust; as also the words and phrases "wish and request,"<sup>1</sup> "have fullest confidence,"<sup>2</sup> "heartily beseech,"<sup>3</sup> "well know,"<sup>4</sup> "of course he will give."<sup>5</sup>

(2.) Subject-matter must be certain.

*Secondly*, The subject-matter of the recommendation or wish must be certain. Thus in *Buggins v. Yates*,<sup>6</sup> where a testator, who, having devised real property to his wife to be sold for payment of his debts and legacies in aid of his personal estate, declared that he *did not doubt* but his wife would be kind to his children, it was insisted on that this constituted a trust of the personal estate; but the court was of opinion that these words gave a right to no child in particular, or a right to any particular part of the estate, but that the clause was void for uncertainty.

Again, in *Curtis v. Rippon*,<sup>7</sup> the testator, after appointing his wife guardian of his children, gave all his property to her, "trusting that she would, in fear of God, and in love to the children committed

<sup>1</sup> *Godfrey v. Godfrey*, 11 W. R. 554; *Liddard v. Liddard*, 28 Beav. 266. [*Ward v. Peloubet*, 2 Stockt. Ch. 305].

<sup>2</sup> *Shovelton v. Shovelton*, 32 Beav. 143. [*Harrison v. Harrison*, 2 Gratt. 1; *Warner v. Bates*, 98 Mass. 274.] But see *Lambe v. Eames*, L. R. 6 Ch. App. 597; *Hutchinson v. Tennant*, 8 Ch. Div. 540; *Dawkins v. Lord Penrhyn*, 4 App. Ca. 51.

<sup>3</sup> *Meredith v. Heneage*, 1 Sim. 553.

<sup>4</sup> *Bardswell v. Bardswell*, 9 Sim. 319.

<sup>5</sup> *Robinson v. Smith*, Mad. & Geld. 194.

<sup>6</sup> 9 Mod. 122.

<sup>7</sup> 5 Mad. 434.



to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the poor." *Held*, that the wife was absolutely entitled to the property; and there being no ascertained part of it provided for the children, and the wife being at liberty at her pleasure to diminish the capital either for the Church or the poor, that the plain intention of the testator was to leave the children dependent on the wife.

Where there is an absolute gift of property to a person, and a recommendation to give to a certain object "what shall be left" at his death," "or what he shall die possessed of," the subject will be considered uncertain.<sup>1</sup>

*Thirdly*, The objects or persons intended to have the benefit of the recommendation or wish must be certain. Thus, in *Sale v. Moore*,<sup>2</sup> where a testator bequeathed the residue of his property to his wife, not doubting that she would consider his near relations as he would have done if he had survived her, the V. C. held that the objects were uncertain. "Who were the objects of the trust? Did the testator," he asked, "mean relations at his own death, or at his wife's death? Did he mean that she should have the liberty of executing the trust the day after his death?"

The tendency of the later decisions is against construing precatory or recommendatory words as trusts. If, therefore, the giver accompanies his expression of wish or request by other words from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the

The object must be certain.

Leaning against construing precatory words as trusts.

<sup>1</sup> *Pope v. Pope*, 10 Sim. 1; *Green v. Marsden*, 1 Drew. 646; *Constable v. Bull*, 3 De G. & Sm. 411; [*Pennock's Estate*, 8 Harris, 268; *Smith v. Bell*, Mart. & Yerg. 302].

<sup>2</sup> 1 Sim. 534.

context, that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request, or where the motive by which the giver was actuated is stated, no trust will be created.<sup>1</sup> So where there was a gift of stock to a person, and there was added parenthetically (to enable him to assist such children of my deceased brother as he may find deserving of encouragement), it was held an absolute bequest, and that no trust was created for the children.<sup>2</sup>

If trust be intended, but not validly created, it enures for the benefit not of the trustee, but of the heir-at-law or next of kin.

It is most important to observe that although vagueness in the object will unquestionably furnish a reason for holding that no trust was intended, yet this may be countervailed by other considerations which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual; and it is not necessary to exclude the legatee from taking a beneficial interest, that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. Thus in *Briggs v. Penny*,<sup>3</sup> the testatrix, after giving, among other legacies, a sum of £3000 to Sarah Penny, and a like sum of £3000 in addition for the trouble she would have as executrix, bequeathed all her residuary personal estate to the said Sarah Penny, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed Sarah Penny sole executrix of her will. It was held by Lord Truro, affirming the decision below, that Sarah Penny did not take the residue for her own benefit. "There is nothing," said his Lordship, "on the face

*Briggs v. Penny.*

<sup>1</sup> Howorth v. Dewell, 29 Beav. 18; Lambe v. Eames, L. R. 10 Eq. 267.

<sup>2</sup> Benson v. Whittam, 5 Sim. 22.

<sup>3</sup> 3 Mac. & G. 546.

of the words which necessarily implies what is vague and indefinite, as in those cases where the court has held that the uncertainty of the object has afforded evidence that no trust was intended. I agree with the Vice-Chancellor in interpreting 'views and wishes' to mean 'designs and desires.' And the very expression of confidence that Miss Penny would make a good use, and dispose of the property in a manner in accordance with the testatrix's designs or desires, or intentions, appears to me to amount to a declaration that Miss Penny was to hold the property for that purpose, or in other words to the same import, upon trust. It seems to me to be tantamount to a bequest upon trust, and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, but still in such a case it is clear a trust was intended, and that is sufficient to exclude the legatee from the beneficial interest. *Once establish that a trust was intended, and the legatee cannot take beneficially.* If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still *in all these cases the legatee is excluded and the next of kin take.* But there is peculiar effect in the word 'trust.' Other expressions may be equally indicative of a fiduciary intent, though not equally apt or clear. In this case, however, we are not left to spell out a trust from the residuary clause alone; the fact that besides a legacy of £3000, another legacy is expressly given to Miss Penny, 'in addition for the trouble she will have in acting as my executrix,' clearly shows that she was not intended to take the residue beneficially; because if Miss Penny was to take the whole residue beneficially, as

the testatrix must be presumed to have acted upon the belief, which the fact warranted, that her estate was abundantly sufficient to satisfy all bequests there could be no object in taking out of that residue, of which she was to have the whole, £3000 for her trouble; the fact of the legacy not only strongly confirms, but it is only consistent with the hypothesis, that the whole residue was not to be taken beneficially. It cannot be referable to the trouble she would have in the execution of the bequests in the will itself or the proved codicils, for though the bequests are numerous, not one of them involves any amount of trouble; whereas the views and wishes of the testatrix to which she alluded, might be such that the carrying of them into effect might involve the executrix in very difficult trusts.”<sup>1</sup>

VII. *Secret Trusts*,  
—when and when  
not enforced.

Where property (real or personal) is given by will to a trustee, or being personal is bequeathed to or vests in the executor, and there is nothing on the face of the will suggesting that the beneficial interest is to be taken by such devisee-trustee or legatee-executor, or simple executor, and *a fortiori*, if the contrary intention appears on the face of the will, then the beneficial interest is undisposed of by the will, and a further writing to be executed as a will is necessary to dispose of the beneficial interest. Therefore, no *secret trust*, declared by word of mouth only, or even declared by writing (unless such writing is duly executed and attested as a will, or, being in existence at the date of, is incorporated in, the will), is permitted to be valid:<sup>2</sup> but the prop-

<sup>1</sup> Langley v. Thomas, 6 De G. M. & G. 645; Bernard v. Minshull, Johns. 276; and disting. Stead v. Mellor, L. R. 5 Ch. Div. 225.

<sup>2</sup> Addington v. Cann, 3 Atk. 141; Muckleston v. Brown, 6 Ves. 52.

erty attempted to be subjected to the secret trust will go, so far as it consists of real estate, to the heir-at-law or residuary devisee, and, so far as it consists of personal estate, to the next of kin or residuary legatee. On the other hand, if the devisee or legatee (whether such legatee be also the executor or not), appears on the face of the will to be intended to take the beneficial interest as well as the legal interest, then no parol evidence to contradict or vary the plain effect of the will is admissible; but to this rule there is the usual exception on the ground of fraud, viz., that parol evidence may be admitted to prove a fraud on the part of the beneficial devisee or beneficial legatee in procuring the gift to be made to him by the will, in that he undertook a certain *secret trust*, and such undertaking on his part was the cause of the will being made as it is made; and in that case the court will enforce discovery of the secret trust, and if it find the secret trust lawful, it will decree execution thereof; and if it find the secret trust unlawful, it will give the property, if real, to the heir-at-law or residuary devisee, and if personal, to the next of kin or residuary legatee of the testator.<sup>1</sup> But if no trust is imposed by the will, and no communication was made in the testator's lifetime to the devisee or legatee, the devise or bequest will be good, although the devisee or legatee may, notwithstanding the absence of legal obligation, be disposed from the bent and impulse of his own mind to carry out what he believes to have been the testator's wishes.<sup>2</sup> And when lands were conveyed to trustees for a charity by a deed duly enrolled, and without any reservation upon the face of it to the grantor, but upon a

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<sup>1</sup> Strickland v. Aldridge, 9 Ves. 519.

<sup>2</sup> Lewin on Trusts, 5th edition, 52; Cullen v. Attorney-General, L. R. 1 H. L. 190; Rowbotham v. Dunnott, 8 Ch. Div. 430.

*secret trust* that the deed should not operate until after the settlor's death, the deed was declared void, and decreed to be set aside.<sup>1</sup>

VIII *Powers in the nature of trusts; otherwise, trusts in the garb (or under the disguise) of powers.*

There remains to be eighthly considered a class of cases, in which powers are given to persons accompanied with such words of recommendation in favor of certain objects as to render them powers in the nature of trusts; so that the failure of the donees to exercise such powers in favor of the objects will not turn to their prejudice, since the court will, to a certain extent, take upon itself the duties of the donees of the power.<sup>2</sup> It is perfectly clear that where there is a mere power of disposing, and that power is not executed, this court cannot execute it.<sup>3</sup> It is equally clear that wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this court will execute the trust.<sup>4</sup> But there is not only a mere trust and a mere power, but there is also known to the court a power with which the party to whom it is given is entrusted, and which he is required to execute; and with regard to that species of power, the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him does not discharge it, the court will to a certain extent discharge the duty in his room and place.<sup>5</sup>

Court takes upon itself their execution.

*Burrough v. Philcox*,—power equal to a trust subject to right of selection

In *Burrough v. Philcox*,<sup>6</sup> a testator directed that certain stock should stand in his name, and certain real estates remain unalienated, “until the follow-

<sup>1</sup> Way v. East, 2 Drew. 44.

<sup>2</sup> Gude v. Worthington, 3 De G. & Sm. 389; Izod v. Izod. 32 Beav. 242.

<sup>3</sup> Brown v. Higgs, 8 Ves. 570.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid., 8 Ves. 561; Tweedale v. Tweedale, 7 Ch. Div. 633; Wheeler v. Warner, 1 S. & S. 304.

<sup>6</sup> 5 My. & Cr. 72.

ing contingencies are completed ;” and after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared that in case his two children should both die without leaving lawful issue, the same should be disposed of, as after-mentioned ; that is to say, the survivor of his two children should have power to dispose by his will, of his real and personal estate, “amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper.” It was held by Lord Cottenham that a trust was created in favor of the testator’s nephews and nieces and their children, subject to a power of *selection* and distribution in his surviving child. “When there appears,” observes his Lordship, “a general intention in favor of a class and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favor of the class.”

General intention in favor of a class carried out, if particular intention fail.

In *Salisbury v. Denton*,<sup>1</sup> a testator by will gave a fund to be at the disposal of his widow by her will, therewith to apply a part for charity, the remainder to be at her disposal among my “relations in such proportions as she may be pleased to direct.” The widow died without exercising the power of determining the proportions in which each was to take. *Held*, that the bequest was not void for uncertainty, but that the court would divide the fund in moieties, and give one of such moieties to charitable purposes, and the other moiety to such of the testator’s relatives as were capable of taking within the statutes of distribution.<sup>2</sup>

*Salisbury v. Denton*,—to same effect.

<sup>1</sup> 3 K. & J. 529.

<sup>2</sup> *Little v. Neil*, 10 W. R. 592; *Gough v. Bult*, 16 Sim. 45.

The shares of the appointees are equal.

The case lastly before referred to shows, that when equity executes an unexecuted power-trust or trust-power of this sort, she applies her own maxim, that equality is equity, and divides the property equally; although the trustee, if he had chosen to exercise the power, might have used a discretion.<sup>1</sup>

IX. *Liability of purchaser to see to the application of purchase-money, where there are cestuis que trustent.*

A *cestui que trust* is the peculiar favorite of courts of equity, and equity has sought by the most stringent rules to protect a *cestui qui trust* against the *mala fides* or carelessness of his trustee. In furtherance of this object, the doctrine was early established in equity, that if a trustee for sale had to pay over the purchase-money to other persons in given shares, the purchaser was bound to see that the trustee applied the purchase-money accordingly, unless the instrument by which the trust was created contained a declaration that the trustee's receipt should be a good discharge. In the absence of such a declaration, the trustee was considered as not to be trusted, and the purchaser, unless he looked after him, was himself responsible for the misapplication of the money.<sup>2</sup> This rule bearing very hardly on purchasers and mortgages who are purchasers *pro tanto*, and being in the way of that unfettered disposition of property which the law so much encourages, several legislative Acts have been passed relieving a purchaser of the most onerous part of his liability.

American rule different.

[In the United States this equitable doctrine of seeing to the application of the purchase money was never favored. The purchaser in this country is *not* bound to see to the application of the purchase-money, unless he has been guilty of fraud or collusion in the matter.<sup>3</sup>]

<sup>1</sup> Willis v. Kymer, 9 Ch. Div. 187.

<sup>2</sup> [Elliot v. Merryman, Barnard, Ch. 78; 1 Wh. & Tud. L. Cas. Eq. 64.]

[<sup>3</sup> Field v. Schieffelin, 7 Johns. Ch. 150.]



## CHAPTER III.

## EXPRESS PUBLIC [OR CHARITABLE] TRUSTS.

CHARITIES are in general highly favored in the law, and charitable gifts have accordingly sometimes received a more liberal construction than gifts to individuals. But in certain other respects charities are treated on the same level as private individuals; and in one respect to be hereafter specified, charities are treated with some little disfavor. We shall consider those various respects in the order above enumerated.

Firstly, charities are sometimes favored above individuals: I. Respects in which charities are favored,--

(1.) Thus, if the testator has expressed an absolute intention to give a legacy to charitable purposes, but he has left uncertain, or to some future act, the mode by which his intention is to be carried into effect, the Court of Chancery, if no mode is pointed out, will of itself supply the defect, and enforce the charity.<sup>1</sup> *Nota bene*, that the *cestui qui trust*, if a private individual, would, in such a case, lose the benefit of the trust, on the ground of uncertainty in the object. (1.) General intention effectuated.

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<sup>1</sup> Pocock v. Att-Gen., L. R. 3 Ch. Div. 342.

If gift be for  
charity, equity  
will effectuate it  
at all vents.

But the object  
must be distinctly  
charitable.

It is, in fact, a well-established principle that if the bequest be for a charity, it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are *in esse* or not, or whether the legatee be a corporation capable in law of taking or not, or whether the bequest can be carried into operation or not; for in all these and the like cases, the Court of Chancery will treat it as a valid charitable bequest, and will dispose of it for such charitable purposes as it shall think fit. But the object must be distinctly charitable, in order to the court construing it in that favorable way; and therefore where the bequest may, in conformity to the express words of the will, either be disposed of in charity of a discretionary private nature, or be employed for any general, benevolent, or useful purpose, or for any general purpose, whether charitable or otherwise, or for charitable or other general purposes at discretion, the bequest will be void, as being not exclusively charitable, and also too general and indefinite for the Court of Chancery to execute. Hence, if a man bequeaths a sum of money to such charitable uses as he shall direct, by codicil annexed to his will, or by note in writing, and he leaves no direction by codicil or note or writing, the Court of Chancery, applying the rule that the nomination of the particular objects is only the mode, and the gift to the charity the substance, of the testamentary disposition, will carry into effect the general intention of charity. But, if a testator makes a bequest to trustees for such benevolent, religious, and charitable purposes, or for such charitable or public purposes, as they should in their discretion approve of, the legacy cannot be supported, and the property devolves on the next of kin of the testator.<sup>1</sup>

<sup>1</sup> *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 522; *Ellis v. Selby*, 1 My. & Cr. 286; *Bates v. Eley*, L. R. 1 Ch. Div. 473;

(1 *a.*) Where the literal execution of the trusts of a charitable gift becomes inexpedient or impracticable, the court will execute them *cy-pres*, *i. e.*, as nearly as it can to the original purpose, so as to execute them, although not in mode, yet in substance. The general principle upon which the court acts is thus laid down by Lord Eldon in the leading case of *Moggridge v. Thackwell*,<sup>1</sup> viz., “that if the testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished.” Thus, where there was a bequest of the residue of the testator’s estate to a company to apply the interest of a moiety “unto the redemption of British slaves in Turkey and Barbary,” one fourth to charity schools in London and its suburbs, and one fourth towards poor and destitute freemen of the company; there being no British slaves in Turkey and Barbary, the court directed a new scheme to be framed *cy-pres*, and approved of a scheme which gave the moiety thus undisposed of to the donees of the other fourth parts.<sup>2</sup>

(1a) Doctrine of *Cy-pres*.

Applies only where there is a general intention of charity.

The doctrine of *cy-pres*, it will be seen, is held to be only applicable where the testator has manifested in his will a *general* intention of charity, and therefore will not be applicable whenever such general intention is not to be found. If, therefore, it

Limit to the *Cy-pres* doctrine.

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In re *Jarman's Estate*, *Leaver v. Clayton*, 8 Ch. Div. 584, and compare *Cocks v. Manners*, L. R. 12 Eq. 574, distinguished in re *Dutton*, 4 Exch. Div. 45.

<sup>1</sup> 7 Ves. 69; and see In re *Williams*, L. R. 5 Ch. Div. 735; In re *Birkett*, 9 Ch. Div. 576.

<sup>2</sup> *Atty-Gen. v. The Ironmongers' Co.*, 2 Beav. 313. [*Jackson v. Philips*, 14 Allen, 580.]

is clearly seen that the testator had but one *particular* object in his mind, as, for example, to build a church at W., and that purpose cannot be answered the next of kin will take.<sup>1</sup>

(2.) Defects of conveyance supplied.

(2.) In farther aid of charities, the court will supply all defects of conveyances, where the donor hath a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute.<sup>2</sup> *Note here*, that in the case of private individuals the imperfection of the conveyance, being voluntary, would be fatal to the creation of the trust.

(3.) Resulting trusts in gifts to charities.

(3.) A third respect in which charities are favored is in respect of resulting trusts. The following rules as to resulting trusts in gifts to charities are laid down in *Lewin on Trustees*.<sup>3</sup>

(a.) Where a general charitable intention, no resulting trust.

(a.) Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularises no objects,<sup>4</sup> or such as do not exhaust the proceeds,<sup>5</sup> the court will not suffer the property, in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

(b.) So too where rents are exhausted by the object indicated but subsequently increase.

(b.) Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds, but in consequence of an increase in the value of the estate, an excess of income subsequently arises, the court will order

<sup>1</sup>Clark v. Taylor, 1 Drew. 642; Loscombe v. Wintringham, 13 Beav. 87.

<sup>2</sup>Story Eq. 1171; Sayer v. Sayer, 7 Hare, 377; Innes v. Sayer, 3 Mac. & G. 606.

<sup>3</sup>Pp. 130, 131.

<sup>4</sup>Atty.-Gen. v. Herrick, Amb. 712.

<sup>5</sup>Atty.-Gen. v. Tonna, 2 Ves. Jr. 1.

the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount.<sup>1</sup>

But to these two rules, there is the following exception, viz., even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances, either result to the heir-at-law,<sup>2</sup> or belong to the donee of the property, subject to the charge.<sup>3</sup>

Secondly,—Charities are sometimes treated on a level exactly with individuals.

(1.) Thus, if a testator gives his property to such person (upon trust) as he shall hereafter name to be his executor, and afterwards he appoints no executor; or if an estate is devised (upon trust) to such person as the executor shall name, and no executor is appointed; or if, an executor being appointed, he dies in the testator's lifetime, and no other is appointed in his place; in all these cases, if the bequest be in favor either of a charity or of an individual, the Court of Chancery will assume the office of an executor, and carry into effect that bequest; *scilicet*, because the beneficiary is certain, although the legal owner is uncertain.<sup>4</sup>

(2.) And to give another instance of the equal treatment of charities and individuals, lapse of time in equity is a bar, in the case of charitable trusts,

Exception.—where rents are not exhausted at time of gift.

II. Respects in which charities are treated on a level with private individuals.  
(1.) Want of executor supplied.

(2.) Lapse of time a bar.

<sup>1</sup> Thetford School Ca., Rep. 130 b; Beverly v. Atty.-Gen. 6 H. L. Cas. 310; Atty.-Gen. v. Caius College, 2 Kee. 150; Atty.-Gen. v. Marchant, L. R. 3 Eq. 424.

<sup>2</sup> Attorney-General v. Mayor of Bristol, 2 J. & W. 308.

<sup>3</sup> Beverley v. Att-Gen. 6 H. L. Cas. 310; Att.-Gen. v. Southmoulton, 5 H. L. Cas. 1; Att.-Gen. v. Trin. Coll. Camb. 24 Beav. 383.

<sup>4</sup> Mills v. Farmer, 1 Mer. 55, 96; Moggridge v. Thackwell, 7 Ves. 36.

exactly as it is (where it is) in cases of mere private trusts and no further ; but, of course, where there is a breach of trust of which the purchaser has notice, lapse of time is no bar either in the case of charities or in the case of individuals ; and under the Judicature Act, 1873, sec. 25, sub-sec. 2, as between an express trustee and his *cestui que trust*, no lapse of time is a bar in respect of a breach of any such trust. Thus, in the case of a charitable trust, where a corporation had purchased *with notice of the trust*, and had held the property under an adverse title for one hundred and fifty years, it was decided that the corporation should reconvey the property upon the original trusts.<sup>1</sup>

III. One respect in which charities are disfavored.—

Thirdly,—It remains to specify the one respect in which charities are treated with disfavor, compared with individuals. It is this :—

Assets not marshalled in favor of charities.

Assets will not be marshalled by a court of equity in favor of a charity. Thus, if a testator give his real and personal estate (consisting of personalty savoring of realty, as leaseholds, and, also, of pure personalty) to trustees, upon trust to sell and pay his debts and legacies, and bequeath the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate, and the personalty savoring of realty, in order to leave the pure personalty for the charity.<sup>2</sup> The rule of the court in such cases is, to appropriate the fund, as if no legal objection existed, as to applying any portion of it to the charity legacies ; and then to hold such proportion of the charity legacies to fail, as would in that way fall to be paid out of the prohibited fund.<sup>3</sup>

<sup>1</sup> Att.-Gen. v. Christ's Hospital, 3 My. & K. 344.

<sup>2</sup> Fourdrin v. Gowdey, 3 My. & K. 397.

<sup>3</sup> Williams v. Kershaw, 1 Keen, 274 n ; Robinson v. Governors of the London Hospital, 10 Hare, 19 ; Tudor's L. C. in Real Prop. 491.

But, of course, although the court will not itself marshal, the testator may direct his property to be marshalled, and the court is then most ready to carry out his directions most favorably for the charity.<sup>1</sup>

Unless by express direction of the testator.

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<sup>1</sup> Miles v. Harrison, L. R. 9 Ch. App. 316; and see Champney v. Davey, W. N. 1877, 27.

## CHAPTER IV.

## IMPLIED AND RESULTING TRUSTS.

**Implied trusts.** An implied trust, as the name denotes, is a trust which is founded on an unexpressed but presumed, *i. e.*, implied, intention of the party creating it. Implied trusts are often called resulting trusts; but besides resulting trusts, all of which are implied trusts, there are other implied trusts that are not, strictly speaking, resulting trusts.

The following are the principal instances of implied trusts, viz.—

(1.) Resulting trust to purchaser upon conveyance to stranger.

(1.) Resulting trust to purchaser of property conveyed or assigned to a stranger, *i. e.*, third person.

“The clear result of all the cases is, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others, or in the names of others without that of the purchaser, whether in one name or in several, and whether jointly or *successive*, results to the man who advances the purchase-money; and it goes in strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor.”<sup>1</sup> To illus-

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<sup>1</sup> Dyer v. Dyer, Smith’s 1 L. C. 223.



trate this statement of the doctrine—Suppose A. <sup>(a.) In case of lands.</sup> advances the purchase-money of a freehold, copyhold, or leasehold estate, and a conveyance surrender or assignment of the legal interest in it is made either to B., or to B. and C., or to A., B., and C. jointly, or to A., B., and C. successively; in all these cases a trust will result in favor of A.

This doctrine is applicable to personal, as well as <sup>(b.) In case of chattels, or personal estate.</sup> to real estate.<sup>1</sup>

The doctrine of resulting trusts is applicable also to cases where two or more persons advance the purchase-money jointly, but the purchase is taken in the name of one of them; for there will be in that case a resulting trust in favor of the other proportioned to the money which he has advanced.<sup>2</sup>

If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, <sup>Parol evidence is admissible to show actual purchaser.</sup> and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made.<sup>3</sup> It has been objected that the admission of such evidence would be contrary to the Statute of Frauds; but it will be seen that the trust which results to the person paying the purchase-money and taking a conveyance in the name of another is a trust resulting by operation of law, and trusts of that nature are expressly excepted from the statute.<sup>4</sup> And a further and better reason for admitting the evidence is, that it is used for the purpose of showing that the nominal or ostensible purchaser in the deed was but the nominee or agent of the true purchaser, for which purpose,

<sup>1</sup> Ebrand v. Dancer, 2 Ch. Ca. 26.

<sup>2</sup> Wray v. Steele, 2 V. & B. 388.

<sup>3</sup> Ryall v. Ryall, 1 Atk. 59; Lench v. Lench, 10 Ves. 511, 517; Bartlett v. Pickersgill, 1 Eden, 515.

<sup>4</sup> 29 Car. II. c. 3 s. 8.

parol or extrinsic evidence was always admissible, and still is so, notwithstanding the Statute of Frauds.<sup>1</sup>

But not so as to defeat the policy of the law.

But no trust will result where the policy of an Act of Parliament would be thereby defeated, as where the subject-matter of the conveyance is a British ship, or land qualifying the grantee to vote for a member of Parliament.<sup>2</sup> [Nor when the purpose is fraud.<sup>3</sup>]

Resulting trust may be rebutted by evidence of purchaser's intention.

Resulting trusts, moreover, as they arise from an equitable presumption, may be rebutted by parol evidence, showing it was the intention of the person who advanced the purchase-money that the person to whom the property was transferred should take for his own benefit.<sup>4</sup>

The presumption of advancement.

And where the purchaser is under a legal, or, in certain cases, a merely moral obligation to maintain or otherwise provide for the person in whose name the purchase is made, equity will raise a presumption that the purchase was intended as an advancement. Therefore, as to purchases made in the name of children or persons similarly favored, it may be laid down as a general rule that there will *prima facie* be no resulting trust for the purchaser, but, on the contrary, a presumption arises that an advancement was intended.

In whose favor it will be raised.

(a.) In whose favor this presumption will be raised.

1. Legitimate child.

1. In favor of a legitimate child.<sup>5</sup>

<sup>1</sup> Higgins v. Senior, 8 Mee. & W. 834.

<sup>2</sup> Ex parte Yallop, 15 Ves. 68; Groves v. Groves, 3 Y. & J. 163, 175; Childers v. Childers, 1 De G. & J. 482. [Leggett v. Dubois, 5 Paige, 114.]

[<sup>3</sup> Baldwin v. Campfield, 8 N. J. Eq. 891.]

<sup>4</sup> Deacon v. Colquhoun, 2 Drew. 21; Wheeler v. Smith, 1 Giff. 300; Lane v. Dighton. Amb. 409.

<sup>5</sup> Sidmouth v. Sidmouth, 2 Beav. 447; Dyer v. Dyer, 2 Cox, 92. [Page v. Page, 8 N. H. 187.]

2. The presumption may also arise in favor of any person with regard to whom the person advancing the money has placed himself in *loco parentis*,<sup>1</sup> thus, in *Beckford v. Beckford*,<sup>2</sup> an illegitimate son, in *Ebrand v. Dancer*,<sup>3</sup> a grandchild, whose father was dead,<sup>4</sup> and in *Currant v. Jago*,<sup>5</sup> the nephew of a wife, were held entitled to property purchased in their names, from the presumption of advancement being intended. But it has been held in a recent case that the mere fact that a person has placed himself *in loco parentis* towards the illegitimate child of his daughter did not alone raise a presumption of advancement in his favor. Wood, V. C., said,—“The court has never yet held that any presumption of advancement arose merely from the fact of so distant a relationship (if it be a relationship) as this, nor yet *merely* from the fact that one of the parties was *in loco parentis* to the other. Here I am asked to conjoin both the doctrines, and out of the weak parts of both to make one strong chain, and hold that the testator was under the obligation of making provision for an illegitimate grandchild, whom he was not under any obligation, moral or legal, to support, and whose father was alive, merely on the ground that he had voluntarily brought up and educated him.”<sup>6</sup>

3. The presumption also arises in favor of a wife.<sup>7</sup> But it will not arise when the purchaser makes the purchase in the names of himself and a

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[<sup>1</sup>Robert's Appeal, 4 Norris, 84.]

<sup>2</sup>Lofft. 490.

<sup>3</sup>2 Ch. Ca. 26.

<sup>4</sup>See *Soar v. Foster*, 4 K. & J. 152.

<sup>5</sup>1 Coll. C. Ca. 261.

<sup>6</sup>*Tucker v. Burrow*, 2 H. & M. 515; *Forrest v. Forrest*, 13 W. R. 380.

<sup>7</sup>*Drew v. Martin*, 2 H. & M. 130; *In re Eykyn's Trusts*, L. R. 6 Ch. Div. 115. [*Whitten v. Whitten*, 3 Cush. 194.]

woman, or in the name of the women alone, with whom he has contracted an illegal marriage, as in the case of a marriage with a deceased wife's sister,<sup>1</sup> or with whom he has contracted no marriage at all, as in the case of a mere mistress or concubine or kept woman.<sup>2</sup>

In *Drew v. Martin*,<sup>3</sup> a husband entered into an agreement for the purchase of land in the name of himself and his wife, and died before the whole of the purchase-money was paid. *Held*, that the purchase enured for the benefit of the widow, and that the unpaid purchase-money was payable out of the husband's personal estate.

*Re De Visme*,—no presumption against a mother in favor of her children.

In *re De Visme*,<sup>4</sup> it was decided that where a married woman had, out of her separate property, made a purchase in the name of her children, no presumption of advancement arose; inasmuch as a married woman was under no obligation, as the law then stood, to maintain her children;<sup>5</sup> and, in the general case, the decision of the court would be the same still, notwithstanding that by the Married Woman's Property Act, 1870 (33 & 34 Vict., c. 93), a married woman having separate property under that Act is now laid under some liability to maintain her lawful children.<sup>6</sup>

The presumption is rebuttable by parol evidence.

The presumption of an advancement being an equitable presumption, may be rebutted by parol evidence. "The advancement of a son is a mere question of intention, and, therefore, facts antecedent or contemporaneous with the purchase, or so immediately after it as to constitute a part of the same transaction, may properly be put in evidence

His contemporaneous acts and declarations are evidence both for and against the purchaser.

<sup>1</sup> *Soar v. Foster*, 4 K. & J. 152.

<sup>2</sup> *Rider v. Kidder*, 10 Ves. 360.

<sup>3</sup> 2 H. & M. 130.

<sup>4</sup> 1 De G. J. & S. 17.

<sup>5</sup> *Holt v. Frederick*, 2 P. Wms. 356.

<sup>6</sup> *Bennett v. Bennett*, 10 Ch. Div. 474.

for the purpose of rebutting the presumption.”<sup>1</sup> In *Williams v. Williams*,<sup>2</sup> it was objected that a parol declaration by the father at the time that he intended the son to hold as trustee, amounted to the creation of a trust in his own favor, and was, therefore, by the Statute of Frauds rendered inadmissible. But this objection was thus answered: that “as the trust would result to the father, were it not rebutted by the son-ship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration.”<sup>3</sup>

A *fortiori* parol evidence may be given by the son to show the intentions of the father to advance him; for such evidence is in support both of the legal interest of the son and of the equitable presumption.<sup>4</sup>

The act and declarations of the father *subsequent* to the purchase may be used in evidence against him by the son, although they could not be used by the father against the son;<sup>5</sup> and the better opinion seems to be, that the subsequent acts and declarations of the son can be used against him by the father, where there is nothing showing the intention of the father at the time of the purchase sufficient to counteract the effect of those declarations.<sup>6</sup> For example, the presumption of advancement will not be rebutted by the mere circumstance that the father retains the property under his control, or that he receives the rents and profits, or interest,

His subsequent acts and declarations are evidence against but not for the purchaser.

<sup>1</sup> Lewin on Trustees, 136; *Tumbridge v. Care*, 19 W. R. 1047; but see *Devoy v. Devoy*, 3 Sm. & Giff. 403.

<sup>2</sup> 32 Beav. 370.

<sup>3</sup> Lewin on Trustees, 144.

<sup>4</sup> *Lamplugh v. Lamplugh*, 1 P. Wms. 113.

<sup>5</sup> *Reddington v. Reddington*, 3 Ridg. P. C. 195. 197.

<sup>6</sup> *Sidmouth v. Sidmouth*, 2 Beav. 455; *Scawin v. Scawin*, 1 Y. & C. C. C. 65.

even though the son were no longer an infant.<sup>1</sup>

[Resulting trusts of the kind we have just considered have been abolished by statute in some States, viz. : Indiana, Kentucky, Michigan, Minnesota, Massachusetts, Maine, New York and Wisconsin.]

(2.) Resulting trust of unexhausted residue.

2. Resulting trust of unexhausted residue. A very common case of resulting trust arises where a settlor conveys property on trusts which do not exhaust the whole property; in that case, as to so much of the property respecting which no trust is declared, there will be a resulting trust in favor of the settlor,<sup>2</sup> and if he is dead, then as regards the realty in favor of his heir or residuary devisee, and as regards the personalty in favor of his next of kin or residuary legatee. And the same rule would apply to a testator giving property by will.

Trustee cannot generally take beneficially.

It is a leading rule with regard to resulting trusts, where property is given simply upon trust, that the trustee is excluded by that fact from taking beneficially, in case of failure of the whole or part of the purpose for which the trust was directed.<sup>3</sup> Thus, in *King v. Denison*,<sup>4</sup> in exemplifying the difference between a gift on trust and a gift vesting the beneficial interest in the donee, the judgment says,—“If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose alone. If the devise is on trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of these two modes admits just this difference; the former is a devise of an estate for the purpose of giving the devisee the beneficial interest,

Devise with a charge,—devisee takes beneficially  
Devise on trust,—devisee takes no benefit.

<sup>1</sup> Sidmouth v. Sidmouth, 2 Beav. 447; Grey v. Grey, 2 Swanst. 594; Williams v. Williams, 32 Beav. 370. Distinguish Bone v. Pollard, 24 Beav. 283.

<sup>2</sup> Parnell v. Hingston, 3 Sm. & Giff. 344.

<sup>3</sup> 2 Sp. 225, 226.

<sup>4</sup> 1 Ves. & Bea. 272.

subject to a particular purpose; the latter is a devise for a particular purpose with no intention to give him any beneficial interest; where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intention to give to the donee of the legal estate the beneficial interest, if the whole is not exhausted by the particular purpose, the surplus goes to the devisee, as it is intended to be given to him."

But suppose that a trust of property having been created does not exhaust the whole of it, and there is no one in whose favor the trust can result, *i. e.*, that as to realty the owner dies intestate and without heirs, and as to personalty he dies intestate and without any next of kin—who takes the property in each of these cases,—the crown [State] or the trustee?

As to realty, in *Burgess v. Wheate*,<sup>1</sup> A. being seized in fee *ex parte paterna*, conveyed real estate to trustees, in trust for herself, her heirs, and assigns, to the intent that she should appoint, and for no other use whatsoever. A. died without having made an appointment, and without any heirs *ex parte paterna*; it was held (under the old law) that the maternal heir was not entitled, and that there being a terre-tenant, the holder of the legal estate, the crown claiming by *escheat* had no right to a conveyance of the land, and that the trustees, therefore, took beneficially. On the same principle, where a mortgage *in fee* is made, and the mortgagor dies intestate and without heirs, the equity of redemption does not escheat, but belongs

Death of settlor, or *cestui que trust* intestate and without representatives.

As to realty, trustee takes beneficially, because, if trustee seised in fee, there is no escheat.

So also where mortgagee seised in fee.

<sup>1</sup> 1 Eden, 177.

to the mortgagee, subject to the mortgagor's debts,<sup>1</sup> and subject, of course, to his widow's right of dower, if he have left a widow.

As to personalty,  
the crown takes  
as *bona vacantia*.

As to personalty, the rule is very different. Under the circumstances stated, the crown, by virtue of its prerogative, may claim it as *bona vacantia*.<sup>2</sup> But where the executor is executor simply, and not also a trustee by express creation of the testator, then it appears that in such a case, the executor may take or keep beneficially the unexhausted residue.<sup>3</sup>

(4.) Resulting  
trusts under the  
doctrine of con-  
version.

(3.) Resulting trusts arising under the operation of the doctrine of conversion are another important group of implied trusts; they are fully considered in Chap. ix., *infra*, to which chapter the reader is referred.

(5.) Implied trusts  
arising out of  
joint-tenancies.

(4.) Implied trusts arising out of joint-tenancies remain to be considered. It is well known, that according to the maxim, "Equity follows the law," limitations which confer an estate in joint-tenancy at law have the same effect in equity, when there are no circumstances which afford grounds for departure from the rule of law; so that where two or more persons purchase lands, and advance the money in *equal* shares, and take a conveyance to themselves and their heirs, they will be joint-tenants in equity as at law, and upon the death of one of them the estate will go to the survivor.<sup>4</sup> But equity, acting on the broad principle that equality is equity, leans strongly against joint-tenancy, with its one-sided right of survivorship; for though it is true that each joint-tenant may have an equal chance of being the survivor, and thus taking the whole,

Equity leans  
against survivor-  
ship in joint-ten-  
ancy.

<sup>1</sup> Beale v. Symonds, 16 Beav. 406.

<sup>2</sup> Taylor v. Haygarth, 14 Sim. 8; Middleton v. Spicer, 1 Br. C. C. 201.

<sup>3</sup> See Lewin on Trustees, 50.

<sup>4</sup> Litt. s. 280.



yet this is but an equality in point of chance; as soon as one dies there is an end to the equality between them; on that event the whole accrues to the survivor. And the equal certainty of having an absolute equal share, or a share proportionate to the amount of the purchase-money advanced, is considered the far higher and truer equity than an equal chance of having the whole or none of the property purchased.<sup>1</sup> Joint-tenancy not being favored in equity, courts of equity will therefore lay hold of almost any circumstances from which it can reasonably be implied that a tenancy in common was intended, and will treat the surviving joint-purchaser as a trustee for the legal representatives of the deceased purchaser. Thus:—

(a.) Where two or more persons purchase lands and advance the purchase-money in *unequal* proportions, and this appears on the deed itself, this makes them in the nature of partners; the survivor will be deemed in equity a trustee for the other, in proportion to the sum advanced by him;<sup>2</sup> and where the purchase-moneys are advanced in *equal* proportions, it is only because, and only when, equity can find no sufficient circumstance of difference, that she reluctantly permits the survivorship incident of joint-tenancy to have its way.

(b.) Where money is advanced either in *equal* or in *unequal* shares, by persons who take a mortgage to themselves jointly, in equity there will be a tenancy in common.<sup>3</sup>

(c.) The same rule is uniformly applied to joint purchases in the way of trade, and for purposes of partnership, and for other commercial transactions, by analogy to, and in expansion and furtherance of,

<sup>1</sup> Ridgen v. Vallier, 2 Ves. Sr. 258.

<sup>2</sup> Lake v. Gibson, 1 Smith L. C. 198.

<sup>3</sup> Morley v. Bird, 3 Ves. 631; Robinson v. Preston, 4 K. & J. 505.

the great maxim of the common law :—*Jus accrescendi inter mercatores pro beneficio commercii locum non habet.*<sup>1</sup>

Land devised in joint tenancy.

Where, however, land is not purchased but is devised to two persons as joint-tenants, who make no use of it for partnership purposes, they will not be held tenants in common in equity, unless they should have subsequently agreed so to hold; but if it can be inferred from their mode of dealing with the property for a long period of time,<sup>2</sup> *e. g.*, if they have used it for partnership purposes or have classed it in their yearly and other accounts as portion of the assets of the partnership, then indeed the general rule will apply, and the right of survivorship will be excluded.

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<sup>1</sup> *Lake v. Gibson*, 1 Smith L. C. 198; *Jeffereys v. Small*, 1 Vern. 217.

<sup>2</sup> *Jackson v. Jackson*, 9 Ves. 591; *Morris v. Barrett*, 3 You. & J. 384; *Davies v. Games*, W. N. 1879, p. 145.

## CHAPTER V.

## CONSTRUCTIVE TRUSTS.

A CONSTRUCTIVE trust, as distinguished from both express and implied trusts, may be defined to be a trust which is raised by *construction* of equity without reference to any intention of the parties, either expressed or presumed.

The following are the principal instances of constructive trusts, viz:—

(1.) The doctrine of constructive trusts receives its most frequent illustrations in cases of what have been termed “equitable liens.” A lien is not, strictly speaking, a *jus in re*, nor yet is it merely a *jus ad rem*; that is, it is not a property in the thing itself, nor yet does it constitute a mere personal right of action for the thing. But it is a *charge* upon the thing, and a charge in the view only of the court of equity, being in that respect unlike a legal rent-charge which issues out of, and is in fact part and parcel of the land.

(a.) “Where the vendor conveys, without more, though the consideration is upon the face of the instrument, and by a receipt indorsed upon it, expressed to be paid, if it is the simple case of a conveyance, the money, or part of it, not being paid,

(1.) Equitable liens.

(a.) Vendor's Lien for unpaid purchase-money.

as between the vendor and vendee, and persons claiming as volunteers, upon the doctrine of this court . . . though, perhaps, no actual contract has taken place, a lien shall prevail, in the one case, for the whole consideration; in the other, for that part of the money which was not paid.”<sup>1</sup>

Waiver or abandonment.

As to what amounts to a waiver or abandonment of the lien the general rule is this,—that the abandonment by the vendor of his lien “is to depend, not upon the circumstance of taking a security, but upon the nature of the security as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, \* \* \* of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual.”<sup>2</sup>

Lien not lost by taking a collateral security *per se*.

It is now settled that a mere personal security for the purchase-money, *e. g.*, a bond,<sup>3</sup> or a bill, or a promissory note,<sup>4</sup> will not *per se* evidence an intention on the part of the vendor to waive his lien over the estate.

Bond.

Although the mere giving of a bond, bill, promissory-note, or covenant for the purchase-money, or the granting of an annuity, secured by bond or covenant,<sup>5</sup> will not be sufficient to discharge the equitable lien, yet where it appears that the note, bond, covenant, or annuity was *substituted* for the consid-

True rule,—was the bond, &c., substitutive of, or only cumulative with, the lien?

<sup>1</sup> Per Lord Eldon in *Mackreth v. Symmons*, 1 L. C. 330. [*Manly v. Slason*, 21 Vt. 271; *Chilton v. Brandon*, 2 Black (U. S.) 458. This doctrine is fully settled in most of the States. In Pennsylvania, North Carolina, South Carolina, Massachusetts, Maine and Kansas, (and perhaps Connecticut, Delaware, and New Hampshire) the principle is not accepted. Note to *Mackreth v. Symmons*, 1 Sm. L. C. 482.]

<sup>2</sup> *Mackreth v. Symmons*, 1 Sm. L. C. 334.

<sup>3</sup> *Collins v. Collins*, 31 Beav. 346. [*Taylor v. Hunter*, 5 Humph. 569.]

<sup>4</sup> *Hughes v. Kearney*, 1 Sch. & Lefr. 134. [*White v. Williams*, 1 Paige, 502.]

<sup>5</sup> *Clarke v. Royle*, 3 Sim. 499.

eration-money, or was, in fact, the thing bargained for, the lien will be lost.<sup>1</sup> Thus, in *Buckland v. Pocknell*,<sup>2</sup> A. agreed to sell an estate to B. for an annuity of £200, to be paid to him for life, and an annuity of £92, to be paid after his decease to his son, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuities to A. and his son, and covenanted to pay them; and by a conveyance of even date, but executed after the annuity deed, after reciting the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in consideration of the premises *and of the annuities having been so granted*, as thereinbefore recited, and of the payment of the mortgage-money, conveyed the estate to B. Upon the death of A., his son's annuity, which had been assigned to the plaintiff, became in arrear. Vice-Chancellor Shadwell held that there was no lien for the annuity. "The question," observed his Honor, "is whether it does not appear on the face of the deed that the party who contracted to sell the land has got *that which he contracted to have*. Adverting to the mode in which the conveyances are made, my opinion is, that it would be quite wrong, because it would be contrary to what appears to have been the agreement of the parties, to hold that after the deeds were executed any lien remained for the annuities. As there was a separate instrument, which was executed first, which contained a distinct grant of the two annuities, and covenants for payment of them; and as the conveyance was made expressly in consideration of that deed; *and as it was part of the express stipulation that the mortgage-money should be paid off, and consequently, that the mort-*

*Buckland v. Pocknell*,—a case of substitution.

<sup>1</sup> 1 Smith L. C. 353. [Gilman v. Brown, 1 Mason, 192.]

<sup>2</sup> 13 Sim. 406.

*gagge should convey his estate to the purchaser, it would be quite inconsistent with the mode in which the parties have dealt to say, that there is an ulterior latent equity for the purpose of securing the annuity in a manner in which neither party ever thought that it was to be secured; and it is evident that they did not think that it was to be so secured, from their having taken a specific security for it. In the case also of Parrot v. Sweetland,<sup>1</sup> which came before me and Mr. Justice Bosanquet, when we had the honor of being commissioners of the Great Seal, we affirmed the judgment of Sir J. Leach in a case where the cause of the transaction showed that the party had got *that for which he bargained*.”<sup>2</sup>*

When the vendor has a lien against the vendee for unpaid purchase-money, it binds the estate in the hands of the following individuals, viz:—

Against whom the  
lien may be en-  
forced.

1. The purchaser himself, and his heirs, and all persons taken under him or them as volunteers.<sup>3</sup>

2. Subsequent purchasers for valuable consideration who bought *with notice* of the purchase money remaining unpaid;<sup>4</sup> for notice, as we have seen, binds the conscience of the party to satisfy all prior equities subsisting against the estate. And even where the first purchaser has sold the estate to a *bona fide* second purchaser without notice, if the second purchase-money or part thereof has not been paid, the original vendor may proceed against the

<sup>1</sup> 3 My. & K. 655.

<sup>2</sup> Dickson v. Gayfere, 21 Beav. 118; Dyke v. Rendall, 2 De G. M. & G. 209; In re Brentwood Brick and Coal Co., L. R. 4 Ch. Div. 562.

<sup>3</sup> Mackreth v. Symmons, 1 Sm. L. C. 357. [Garson v. Green, 1 Johns Ch. 308.]

<sup>4</sup> Walker v. Preswick, 2 Ves. Sr. 622; Hughes v. Kearney, 1 Sch. & Lefr. 135; Morris v. Chambers, 29 Beav. 246. [Eskridge v. McClure, 2 Yerg. 84.]

estate for his lien, or against the second purchase-money remaining in the hands of such second purchaser for satisfaction; for, in such a case, the latter, not having yet paid his money, and getting notice of the lien before he pays it, becomes, in fact, a purchaser *with notice*, and with the usual consequence, viz., he takes the estate *cum onère* to the extent of the unpaid portion of the original purchase-money. And this proceeds upon a general ground, that where trust-money can be traced, it may be followed and applied to the purposes of the trust.<sup>1</sup>

3. The assignees, *i. e.*, trustee, of a bankrupt, although they may have had no notice of it; for the assignees, *i. e.*, trustee, in bankruptcy take subject to all the equities attaching to the bankrupt.<sup>2</sup>

4. If the legal estate be outstanding, then as the second purchaser for value, whether with or without notice, has only an equitable interest, he will be postponed to the equitable lien, which comes earlier in date, in accordance with the maxim, "*Qui prior est tempore potior est jure*."

On the other hand, the lien will not prevail against a *bona fide* purchaser for valuable consideration without notice, who has the legal estate in him,<sup>3</sup> for here the maxim applies,—“Where the equities are equal the law shall prevail.”

And the first vendor may lose his lien postponed through his own negligence. Thus in *Rice v. Rice*,<sup>4</sup> certain leaseholds were assigned to a purchaser by a deed, which recited the payment of the whole pur-  
Against whom the lien is not enforced.  
Vendor may lose his lien by negligence.—*Rice v. Rice*.

<sup>1</sup> *Lench v. Lench*, 10 Ves. 511.

<sup>2</sup> *Ex parte Hanson*, 12 Ves. 349; *Fawell v. Heelis*, Amb. 724.

<sup>3</sup> *Cator v. Pembroke*, 1 Bro. C. C. 302, [*Parker v. Foy*, 43 Miss. 260.]

<sup>4</sup> 2 Drew. 73.

chase-money, and had the usual receipt indorsed on it; the title-deeds were delivered up to the purchaser. Some of the vendors received no part of their share of the purchase-money, having allowed the payment to stand over for a few days, on the promise of the purchaser then to pay. The day after the execution of the deeds, the purchaser deposited the assignment and title deeds with the defendants, with a memorandum of deposit to secure an advance, and then absconded without paying either the unpaid vendors or the equitable mortgagees. It was held that the defendants, the equitable mortgagees, although having only an equity, and although being posterior in point of date, were entitled to payment out of the estate in priority to the claim of the unpaid vendors for their lien, on the following grounds:—That though as equitable interests they were of equal worth in their abstract nature and quality, and would in the general case have been paid merely according to their order in point of time, still that the vendors had lost their priority by their own negligence; that “the vendors, when they sold the estate, chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared, in the most deliberate and solemn manner, both in the body and by a receipt indorsed, that the whole purchase-money had been paid; that they might have required that the title-deeds should remain in their custody, with or even without a memorandum, by way of equitable mortgage, as a security for the unpaid purchase-money; that they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity; that the defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the pur-



chaser's title; and that they had in effect by their own acts assured the mortgagee that as far as they (the vendors) were concerned, the mortgagor had an indefeasible title both at law and in equity."<sup>1</sup>

(b.) Corresponding to the lien of the vendor for his unpaid purchase-money, is the right of the vendee, to have a lien upon the estate in the hands of the vendor for the whole or part of the purchase-money prematurely paid;<sup>2</sup> and this lien will exist not only as against the vendor, but also as against a subsequent mortgagee who had notice of the payments having been made,<sup>3</sup> and in fact generally against all the like persons above enumerated against whom the vendor's lien would prevail.

(2.) Another common instance of a constructive trust arises upon the renewal of leases; the invariable rule being that a lease renewed by a trustee or executor in his own name and for his own benefit professedly, although without fraud, and even upon the refusal of the lessor to grant a new lease to the *cestui que trust*, shall be held upon trust for the person entitled to the old lease.<sup>4</sup> And this rule is applicable also to persons having a limited interest in a renewable lease, as a tenant for life; if he renews it in his own name he will be held a trustee for those entitled in remainder.<sup>5</sup> And the reason of this rule is obvious, that it is but fair, if a tenant for life, acting upon the goodwill that accompanies the possession, gets a more durable term, that he should hold it for the benefit of those in re-

(b.) Vendee's lien for prematurely paid purchase-money.

(2.) Renewal of lease by trustee in his own name.

Or by tenant for life.

<sup>1</sup> Wilson v. Keating, 4 De G. & J. 588.

<sup>2</sup> Wythes v. Lee, 3 Drew. 396; Turner v. Marriott, L. R. 3 Eq. 744.

<sup>3</sup> Watson v. Rose, 10 W. R. 745, 10 H. L. Cas. 672.

<sup>4</sup> Keech v. Sandford, 1 Sm. L. C. 46. [Davoue v. Fanning, 2 Johns Ch. 282.]

<sup>5</sup> Mill v. Hill, 3 H. L. Cas. 828; Yem. v. Edwards, 1 De G. & J. 598.

Or partner.

mainder.<sup>1</sup> So likewise, if a partner renew a lease of the partnership premises on his own account, he will, as a general rule, be held a trustee of it for the firm,<sup>2</sup> and the like rule applies to all persons occupying a fiduciary or quasi-fiduciary relation.<sup>3</sup>

(3.) Allowance for payments where same are necessary and permanently beneficial.

(3.) A constructive trust may also arise where a person who is only part owner, acting *bona fide*, permanently benefits an estate by repairs or improvements: for a lien or trust may arise in his favor in respect of the sum he has expended in such repairs or improvements.<sup>4</sup> Thus it was intimated in *Nessom v. Clarkson*,<sup>5</sup> that although a person expending money by mistake upon the property of another has no equity against the owner who was ignorant of and did not encourage him in his expenditure,<sup>6</sup> yet if it were necessary for the true owner to proceed in equity he would only be entitled to its assistance, according to the ordinary rule, by doing equity and making compensation for the expenditure, so far, of course, and only so far as the expenditure was necessary, and has proved permanently beneficial. But a person will have no equity who lays out money on the property of another with full knowledge of the state of the title,<sup>7</sup> or who lays out money unnecessarily and fancifully, extravagantly or improperly.

He who seeks equity must do equity.

Improvements by tenant for life.

So again, where a tenant for life, under a will, has gone on to finish permanently beneficial im-

<sup>1</sup> James v. Dean, 15 Ves. 236.

<sup>2</sup> Featherstonhaugh v. Fenwick, 17 Ves. 311; Clegg v. Fiswick, 1 Mac. & G. 294; Bell v. Barnett, 21 W. R. 119. [Anderson v. Lemon, 4 Seld. 236.]

[<sup>3</sup> Huson v. Wallace, 1 Rich. Eq. 2.]

<sup>4</sup> Lake v. Gibson, 1 Sm. L. C. 198.

<sup>5</sup> 4 Hare, 97.

<sup>6</sup> Nicholson v. Hooper, 4 My. & Cr. 186. [Rathburn v. Colton, 15 Pick. 471.]

<sup>7</sup> Rennie v. Young, 2 De G. & Jo. 136; Ramsden v. Dyson, L. R. 1 H. L. 129.

provements to an estate which had been begun by the testator, courts of equity have deemed the expenditure a charge for which the tenant is entitled to a lien.<sup>1</sup> Thus, in *Dent v. Dent*,<sup>2</sup> a tenant for life had expended on the estate large sums—(1) In completing a mansion-house, left unfinished by the testatrix; (2) In erecting a conservatory and vinery; (3) In rebuilding farmhouses, etc.; (4) In erecting cottages; (5) In erecting permanent furnaces, works, buildings, &c., at some copper works; (6) In draining marshy ground; and (7) In making payments to keep a foreign mine working so as to prevent its forfeiture;—it was held that he was entitled to no allowance for these sums out of the personal estate of the testatrix, held upon similar trusts, or to any inquiry respecting them, excepting those laid out in the 1st and 7th of them, *i. e.*, in completing the mansion, and in keeping up the foreign mine, an inquiry being directed, whether the outlay on these two accounts, or either (and which?) of them, was or was not for the benefit of the inheritance.<sup>3</sup>

A trustee, executor, or other fiduciary person who has renewed a lease has, however, a lien upon the estate for the costs and expenses of the renewal with interest.<sup>4</sup>

Trustee has a lien on trust-fund for expenses of renewal.

Similarly where payments have been made in order to prevent the lapse of a policy, the person making such payments is entitled to a lien for the

Salvage-moneys on policy of insurance.

<sup>1</sup> *Hibbert v. Cooke*, 1 Sim. & Stu. 552. [*Sohier v. Eldridge*, 103 Mass. 345.]

<sup>2</sup> 30 Beav. 363; and see *In re Leslie's Settlement* [Trusts, L. R. 2 Ch. Div. 185.

<sup>3</sup> *Dunne v. Dunne*, 3 Sm. & Giff. 22. *In re Leigh's Estate*, L. R. 6 Ch. 887.

<sup>4</sup> *Holt v. Holt*, [1 Ch. Ca. 190; *Coppin v. Fernyhough*, 2 B. C. C. 291; and, as to renewal fund, see *Maddy v. Hale*, L. R. Ch. Div. 327.

amount on the proceeds of the policy, on the footing of salvage-moneys,<sup>1</sup> but apparently to no other beneficial interest in the property.

(4.) Heir of mortgagee trustee for personal representatives.

(4.) When a person has a mortgage in fee which he has not foreclosed, the legal estate in the mortgaged premises descends, in case of intestacy, to his heir; but in equity the mortgaged estate being only a security for money, the heir or devisee will be held a trustee of the legal estate in the lands for the personal representatives of the deceased mortgagee for the purpose of securing them the mortgage moneys, to hand over or distribute among and through the persons entitled to the personal estate of the mortgagee.<sup>2</sup>

Equity's manner of constructing trusts,—explained and illustrated.

Before concluding this chapter, it may be usefully pointed out that the constructive trusts exemplified above are constructed by the court of equity in the following manner:—First of all, equity asks, Who has got the *legal* estate, *i. e.*, to whom does the property belong at law, apart from all equitable considerations? That matter being once ascertained, the court of equity acknowledges the legal ownership, and without impugning same welcomes it rather, and makes a foundation of it, upon which to build up, that is, to *construct*, the trust for which it perceives an equity. Thus, in the case of the vendor's lien (being Constructive Trust, No. 1, *α*, *supra*), the court of equity finds the legal estate in the vendee, inasmuch as the vendor has already conveyed same to him; and then the court founds upon the vendee *as having the legal estate*, the equitable lien or charge for the unpaid purchase-money. So again, in the case of the vendee's lien

<sup>1</sup> Norris v. Caledonian Insurance Company, L. R. 8 Eq. 127; Gill v. Downing, L. R. 17 Eq. 316.

<sup>2</sup> Thornbrough v. Baker, 2 Sm. L. C. 1046. [Trim. v. Marsh. 54 N. Y. 623.]

(being Constructive Trust No. 1, *b*), the court of equity finds the legal estate in the vendor, inasmuch as he has not yet conveyed same to the vendee; and then the court founds upon the vendor *as still having the legal estate*, the equitable lien or charge for the prematurely paid purchase-money. Similarly, in all the other cases,—it being, in fact, the rule of the court of equity to found upon the legal estate only,—a rule the forgetting or the ignorance of which occasions not only unnecessary difficulty to the student, but oftentimes mistakes in the conduct of actual legal business.

## CHAPTER VI.

TRUSTEES AND OTHERS STANDING IN A FIDUCIARY  
RELATION.

Who may be trustees.

A trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and should (for reasons of convenience) be domiciled within the jurisdiction of the courts of equity.<sup>1</sup> A corporation as to lands,<sup>2</sup> a feme covert,<sup>3</sup> and an infant,<sup>4</sup> [or one of the States of the United States],<sup>5</sup> as to both real and personal estate, are, on account of their several disabilities, unsuited to hold, but none of them are incapable of holding, the office of trustee.

Equity never wants a trustee.

It is a general rule in courts of equity, that wherever a trust exists, either by the declaration of the party, or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested (not being a *bona fide* purchaser for valuable con-

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<sup>1</sup> Lewin on Trustees, 27.

<sup>2</sup> Ibid. 27, 29.

<sup>3</sup> Lake v. DeLambert, 4 Ves. 595.

<sup>4</sup> Hearle v. Greenbank, 3 Atk. 712.

<sup>5</sup> [McDonough v. Murdock, 15 How. 367.]

sideration without notice, or otherwise entitled to protection),<sup>1</sup> to execute the trust. For it is a rule in equity which admits of no exception, that a court of equity never wants a trustee. And this rule is applied where property has been bequeathed in trust, without the appointment of a trustee; if it is personal estate, the personal representative is deemed the trustee; and if real estate, the heir or devisee is deemed the trustee; and in either case, the trustee is bound to the due execution of the trust. The lapse of the legal estate never has the least influence upon the trusts to which it is subject; if the individuals named as trustees fail either by death, or by being under disability, or by refusing to act, the court will provide a trustee; if no trustees are appointed at all, the Court of Chancery assumes the office in the first instance; if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium appointed by the Court of Chancery. The trustee is, in fact, a mere machine, but a machine that acts according to the rules of equity, and departs therefrom at his own particular peril, although at the same time he is the servant of his *cestui que trust* for the time being. By "*cestui que trust*" is here meant, not one person having only a partial beneficial interest in the trust fund,—for the trustee is not the servant but the controller of such partary or partial beneficiary,—but the aggregate body of persons (born and unborn) that make up the entirety of the persons entitled, or who may be or become entitled, to any beneficial interest in the trust property as such. And even the person for whom he shall be trustee depends entirely upon the will of such *cestui que*

In what sense the trustee is the servant, and in what sense the controller, of his *cestui que trust*.

<sup>1</sup> Thorndike v. Hunt, 3 De G. & J. 563; Salisbury v. Bagott, 2 Swanst. 608.

- *trust*, whether entitled under the original creation of the trust, or by subsequent devolution or transfer;<sup>1</sup> and on the death of one trustee, the entire responsibilities survive.<sup>2</sup>

Trustee may be compelled to any act of duty.

The *cestuis que trustent*, or any one or more of them, are entitled to file a bill against the trustee, to compel him to the execution of any particular act of duty, and a fund in the hands of trustees may be bound by the act or assignment of any particular *cestui que trust* who is *sui juris* without the consent of the trustees, but only, of course, to the extent of the beneficial interest of such particular

Or restrained from abuse of his legal title.

*cestui que trust*.<sup>3</sup> If any *cestui que trust* has reason to suppose, and can satisfy the court, that the trustee is about to proceed to an act not authorized by the true scope of the trust, he may obtain an injunction from the court to restrain the trustee from such a wanton exercise of his legal power.<sup>4</sup> A

Trustee cannot renounce after acceptance.

trustee who has accepted the trust cannot afterwards renounce it. The only mode in which he can obtain a release is either under the sanction of a court of equity, or by virtue of a special power in the instrument creating the trust, or with the consent of all parties interested in the estate, being *sui juris*;<sup>5</sup> and of these three modes of release, the second one is usually the only one unattended with expense. As regards the first mode of release, the court will not sanction the release merely because the trustee wishes it; and as regards the third mode of release, it is rarely, if ever, the certain fact that all the *cestuis que trust* are *sui juris* or even yet in existence.

<sup>1</sup> 2 Spence. 876; Atty.-Gen. v. Downing, Wilm. 23.

<sup>2</sup> Atty.-Gen. v. Gleg, 1 Atk. 356.

<sup>3</sup> Donaldson v. Donaldson, Kay, 711.

<sup>4</sup> Balls v. Strutt, 1 Hare, 146; Lewin on Tr. 613.

<sup>5</sup> Manson v. Baillie, 2 Macq. H. L. Cas. 80; Lewin on Tr. 204.



The office of trustee being one of personal confidence cannot be delegated. Trustees, who take on themselves the management of property for the benefit of others, have no right to shift their duty on other persons, and if they do so, they remain subject to responsibility towards their *cestui que trust* for whom they have undertaken the duty.<sup>1</sup> The incapacity of the trustee to delegate his office is to be understood of a trustee being and remaining one; because, of course, under a special power in that behalf, he may otherwise retire altogether from the trust and appoint a new trustee in his place, and in that way delegate (in one sense) the entire trust. But the trustee who does not resign altogether cannot delegate in part, for the reasons stated, and upon the maxim, "*Delegatus non potest delegare*," which although ridiculed by Bentham as a "fallacy of rhythm," is based and maintained in English law upon sound and enduring reasons.

But trustees and executors may justify their administration of the trust-fund by the instrumentality of others, where there exists a moral necessity for it. Necessity, which includes the *regular course of business*, will exonerate. Thus, if "an executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay those debts, he is considered to do this of *necessity*, he could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he is made responsible when he remitted money to a person to whom he would on the like

Trustee cannot  
delegate his office

Delegation permitted where  
there is a moral  
necessity for it.

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<sup>1</sup> Turner v. Corney, 5 Beav. 517; Bostock v. Floyer, L. R. 1 Eq. 26; Eaves v. Hickson, 30 Beav. 136. [Hawley v. James, 5 Paige, 487].

occasion have himself given credit, and would in his own business have remitted money in the same way.''<sup>1</sup>

The care and diligence required of trustees, as regards,—

Trustees (whether or not being also executors) are bound to take the same care of trust property, as a man of ordinary caution would take of his own,<sup>2</sup> and if they have done so they will not be liable for any *accidental* loss; as, for instance, by a robbery of the property while in their own possession,<sup>3</sup> or by a robbery or loss, whilst in the possession of others with whom it has necessarily, *i. e.*, in the ordinary course of business, been entrusted.<sup>4</sup> But the court, in determining the liability or non-liability of a trustee for any loss sustained by the trust estate, distinguishes between the *duties* imposed upon and the *discretions* vested in him as such. And as regards his *duties*, the utmost diligence in observing the same (*i. e.*, *exacta diligentia*) is his only protection against liability for any loss; while as regards his *discretions*, or discretionary powers, an amount of diligence equal to what he bestows on his own property will protect him from liability. Thus, firstly, as regards *duties*, if a trustee or executor permit the trust-fund to remain unnecessarily, or contrary to his duty, in the hands of third parties, as, for instance, if money be left in the hands of a banker more than a year after the testator's death, and after the debts, &c., have been paid;<sup>5</sup> or if a trustee mix trust property with his

(a.) Duties.

<sup>1</sup> Joy v. Campbell, 1 Sch. & Lef. 341; Clough v. Bond, 3 My. & Cr. 497; *Ex parte* Belchier, Amb. 219. [Leggett v. Hunter 19 N. Y. 445].

<sup>2</sup> [Davis v. Hannan, 21 Gratt. 200.]

<sup>3</sup> Morley v. Morley, 2 Ch. Ca. 2.

<sup>4</sup> Jones v. Lewis, 2 Ves. 240; Swinfen v. Swinfen, 29 Beav. 211. [Foster v. Davis, 46 Mo. 268].

<sup>5</sup> Darke v. Martyn, 1 Beav. 525.

own,<sup>1</sup> or parts with his exclusive control over the fund, by associating with himself the authority of another person ;<sup>2</sup> or if the fund be left to the entire control of a co-trustee,<sup>3</sup> it will be at his risk.<sup>4</sup> But secondly, as regards *discretions*, *e. g.*, if, under the investment clause in the will or settlement, he has the power of investing in any one or more at his discretion of certain specified funds comprising good, bad, and indifferent securities, and he invests (say, at the request of an importunate *cestui que trust*) part of the trust funds in Turkish Bonds as being one of the authorized investments, then he will be liable, if he would not have invested his own moneys in that class of investment ; but otherwise he will not be liable, even in the case of a loss to the trust estate.<sup>5</sup> (b. Discretions.

It is an established rule that trustees, executors, or administrators, or others standing in a similar situation, shall have no allowance for their care and trouble, and this proceeds upon the well-known principle of equity, that a trustee shall not profit by his trust.<sup>6</sup> [This strict rule of the English Courts has not been adopted in the United States. Here trustees and other fiduciaries are entitled to a reasonable compensation for their services, the amount of which is sometimes regulated by statute and sometimes settled by the court].<sup>7</sup> No remuneration allowed to trustee.

<sup>1</sup> Lupton v. White, 15 Ves. 432.

<sup>2</sup> Salway v. Salway, 2 Russ. & My. 215.

<sup>3</sup> Clough v. Bond, 3 My. & Cr. 490.

<sup>4</sup> Castle v. Warland, 32 Beav. 660; Lunham v. Blundell, 27 L. J. Ch. 179; Matthews v. Brise, 6 Beav. 239; 22 & 23 Vict.. c. 35, s. 31.

<sup>5</sup> Tabor v. Brooks, 10 Ch. Div. 273; *In re* Norrington, Bindley v. Partridge, W. N. 1879, 37.

<sup>6</sup> Robinson v. Pett, 2 Sm. L. C. 207; Hamilton v. Wright, 9 Cl. & F. 111.

<sup>7</sup> [Wistar's Appeal, 4 P. F. Smith, 63].

Trustees may stipulate to receive compensation.

There is nothing to prevent trustees from contracting with their *cestui que trust*, to receive some compensation for the performance of the duties of the trust. But such a contract would be very jealously scrutinized by a court of equity, and if there be any appearance of unfairness, or unconscionable advantage on the part of the trustee, the agreement will not be enforced.<sup>1</sup>

Trustee must not make any advantage out of his trust.

In further illustration of the maxim that a trustee shall not make a profit by his trust, may be mentioned those cases where one, in a fiduciary position, uses that position as a means of obtaining any profit or advantage which he would not otherwise obtain. It was upon this principle that Lord Eldon in one case directed an inquiry whether the liberty of sporting over the trust estate could be let for the benefit of the *cestui que trust*, and in the meantime the trustee was to appoint a gamekeeper for the preservation of the game, but was not to keep up an establishment for his, the trustee's, own pleasure.<sup>2</sup>

(a.) Not enjoy the shooting.

(b.) Not charge more than he gave for the purchase of debts.

If trustees or executors buy up any debt or encumbrance to which the trust estate is liable, for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the creditors or legatees, or other *cestuis que trust*, shall have the advantage of it.<sup>3</sup>

(c.) Not take trade profits, paying interest instead.

Again, if a trustee or executor use the fund committed to his care in buying and selling land, or in stock speculations, or lay out the trust-money in a commercial adventure, as in fitting out a vessel for a voyage, or if he employ it in business, in all these cases, while the executor or trustee is liable for all

<sup>1</sup> Ayliffe v. Murray, 2 Atk. 58.

<sup>2</sup> Webb v. Earl of Shaftesbury, 7 Ves. 480-488.

<sup>3</sup> Pooley v. Quilter, 4 Drew. 184, 2 De G. & J. 327; Fosbrooke v. Balguy, 1 My. & K. 226. [Green v. Winter, 1 Johns Ch. 27.]

losses, the *cestui que trust* may insist either on having the trust-fund replaced with interest, or on having the profits made by the trust-funds so employed.<sup>1</sup>

So, likewise, a person standing in a fiduciary relation towards another will not be allowed to benefit by his trust, by obtaining a renewal of a lease in his own name, but will be deemed in equity to be a trustee for those interested in the original term,<sup>2</sup> nor will a trustee, as a general rule, be permitted to purchase the trust estate from his *cestui que trust*.<sup>3</sup>

Trustee cannot renew lease in his own name.  
Or purchase trust-estate.

The foregoing principles apply to constructive trustees, as agents,<sup>4</sup> guardians,<sup>5</sup> partners,<sup>6</sup> directors of companies,<sup>7</sup> and even promoters of companies,<sup>8</sup> and generally, to all persons clothed with a fiduciary character. All such persons must refund all profits improperly made at the expense of the trust estate, and will not be allowed, as a general rule, any remuneration for their trouble.<sup>9</sup>

Same principles apply to agents, etc.

However, under exceptional circumstances, trustees and other persons standing in the like fiduciary relation, may effectively and securely purchase from

Exceptional cases, in which trustee's purchase from *cestui que trust* holds good.

<sup>1</sup> *Docker v. Simes*, 2 My. & K. 655; *Townsend v. Townsend*, 1 Giff. 201; *Willett v. Blanford*, 1 Hare, 253.

<sup>2</sup> *Keech v. Sandford*, 1 Sm. L. C. 46. [*Davoue v. Fanning*, 2 Johns. Ch. 252].

<sup>3</sup> *Fox v. Mackreth*, 1 Sm. L. C. 123. [*Jamison v. Glasscock*, 29 Mo. 191].

<sup>4</sup> *Morret v. Paske*, 2 Atk. 54; *Kimber v. Barber*, L. R. 8 Ch. 56; *Macpherson v. Watt*, 3 App. Ca. 254.

<sup>5</sup> *Powell v. Glover*, 3 P. W. 252, n.

<sup>6</sup> *Wedderburn v. Wedderburn*, 4 My. & Cr. 41.

<sup>7</sup> *Gt. Luxembourg Rail Co. v. Magnay*, 25 Beav. 586.

<sup>8</sup> *Bagnall v. Carlton*, 6 Ch. Div. 371; *New Sombrero Co. v. Erlanger*, 5 Ch. Div. 73; 3 App. Ca. 1218.

<sup>9</sup> *Docker v. Simes*, 2 My. & K. 665; *Foster v. M'Kinnon*, Gr. 510; *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189.

their *cestuis que trustent*, e. g., (1) If the trustee will give more for the trust estate than any other purchaser, in other words, if he will give a "fancy-price" for it, or (2) If the offer to sell proceeds from the *cestuis que trustent*, and the trustee pays the ordinary value in the market, keeping (as it is absurdly said) his *cestuis que trustent* at arm's length, or (3) If the sale is by public auction, and the trustee has the leave of the court to bid,—then, and in any of these cases, the purchase by the trustee will hold good.<sup>1</sup>

Constructive, not liable to same extent as express, trustee.

Furthermore, if a person does not fill any expressly fiduciary character, as that of trustee or executor, but is merely a constructive trustee, his liabilities are in some respects different from those of an express trustee. His duties and responsibilities are matters of quasi-contract, and he is, as it appears, not bound by many of the rules which equity has annexed to the express fiduciary relation. The distinction is clearly drawn in Lord Westbury's judgment in *Knox v. Gye*.<sup>2</sup> There it was attempted to be argued, that a surviving partner was a trustee of the share of his deceased partner, but his Lordship, after adverting to the case of vendor and purchaser, and stating, that there, though the vendor might by a metaphor be called a trustee, *he was a trustee only to the extent of his obligation to perform the agreement* between himself and the purchaser, proceeded as follows:—"In like manner here, the surviving partner may be called a trustee for the dead man, but the trust is *limited to the discharge of an obligation, which is liable to be barred by lapse of time*. As between the express trustee and *cestui que trust*, time will not run, but the surviving partner is not a trustee in that full and proper sense. It is most im-

Remarks of Lord Westbury in *Knox v. Gye*.

Time runs in favor of constructive trustee, although not in favor of express trustee.

<sup>1</sup> *Hickley v. Hickley*, L. R. 2 Ch. Div. 190.

<sup>2</sup> L. R. 5 H. L. 656, 675; *Noyes v. Crawley*, 10 Ch. Div. 31.

portant to mark this again and again, for there is not a more fruitful source of error in law than the inaccuracy of language. The application to a man, who is improperly and by metaphor only called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Macclesfield that nothing in law is so apt to mislead as a metaphor.’’<sup>1</sup>

Similarly, where a person is merely a constructive trustee, as having employed the money of another in a trade or business, although he must account for the profits of the money he has employed, he may have an allowance made to him for his loss of time and for his skill and trouble.<sup>2</sup>

Constructive trustee may have remuneration for time and skill.

In *Townley v Sherborne*,<sup>3</sup> the extent of the responsibility of one trustee for the acts or defaults of his co-trustee was first discussed. A., B., C., and D. were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and signed acquittances, but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands? After much consideration, the judges resolved :—That where lands are conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after death or decayeth in his estate, his co-trustees shall not be

One trustee is liable for his co-trustee,—practically.

<sup>1</sup> *Taylor v. Taylor*, 28 L. T., N. S. 189; *Edwards v. Warden*, 22 W. R. 669.

<sup>2</sup> *Brown v. Litton*, 1 P. W. 140; *Brown v. De Tastet, Jac.* 284; *Docker v. Somes*, 2 M. & K. 655.

<sup>3</sup> 2 Sm. L. C. 870; and see *Lewis v. Nobbs*, 8 Ch. Div. 591.

charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed unless some practice, fraud, or evil-dealing appears to have been in them to prejudice the trust, for they being by law joint-tenants, or tenants in common, every one by law may receive either all or as much of the profits as he can come by ; it is no breach of trust to permit one of the trustees to receive all, or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipts of the profits. But it was also resolved : —That if upon the proof of circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing.<sup>1</sup> And it was, in fact, decided in *Townley v. Sherborne*, that if a trustee joined with his co-trustees in *signing receipts*, he was liable, even though he had received nothing,—the liability arising not from his mere signing of the receipts (because, of course, it was his duty to do that), but from his subsequently leaving in the hands of his co-trustee the money that had been received (which, as we have just seen, it was a violation of his duty to do).

"Signing for conformity,"—effect of  
(1.) By itself alone

And, in fact, in later times the rule has been established that a trustee who joins in a receipt for conformity, but without receiving, shall not by that circumstance alone, be rendered liable for a misapplication by the trustee who receives, for "it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him, by his joining in the

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<sup>1</sup> *Mucklow v. Fuller*, Jac. 198; *Booth v. Booth*, 1 Beav. 125.



receipts, is but notional.”<sup>1</sup> Where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in this their joint capacity, and it would be tyranny to punish a trustee for an act, which the very nature of his office will not permit him to decline,<sup>2</sup> *scil.*, where that act is not coupled with any breach of duty arising subsequently. At law, where trustees join in a receipt, *prima facie* all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him, to show that the money acknowledged to have been received by all, was in fact received by one, and he himself joined only for conformity.<sup>3</sup> But that means of exoneration from subsequent loss is in general of little worth, the subsequent loss commonly proceeding from a subsequent neglect of duty by the non-receiving but signing trustee. For though a trustee is safe if he does no more than authorize the receipt and retainer of the money by his co-trustee, yet he will not be justified in allowing the money to *remain* in his hands for a longer period than the circumstances of the case reasonably require,<sup>4</sup> *e. g.*, a fortnight’s neglect may occasion all the loss.

Co-executors on the other hand are generally answerable each for his own acts only, and not for the acts of their co-executors.<sup>5</sup> For in respect of

(2.) When coupled with subsequent neglect of duty.

One executor not liable for his co-executor,—practically.

<sup>1</sup> *Fellows v. Mitchell*, 1 P. W. 81; *In re Fryer*, 3 K. & J. 317. [*Kip v. Deniston*, 4 Johns. 23].

<sup>2</sup> *Lewin*, 215.

<sup>3</sup> *Brice v. Stokes*, 2 Sm. L. C. 877; 11 Ves. 319.

<sup>4</sup> *Brice v. Stokes*, *ubi supra*; *Thompson v. Finch*, 8 De G. M. & G. 560; *Walker v. Symonds*, 3 Swanst. 1; *Hanbury v. Kirkland*, 3 Sim. 265.

<sup>5</sup> *Williams v. Nixon*, 2 Beav. 472.

receipts, the case of co-executors is materially different from that of co-trustees, and this difference arises not from any principle, but from the different powers with which co-trustees and co-executors are respectively invested by the law, so that a particular circumstance which would afford a presumption of the performance of an act involving responsibility in the case of an executor, would not afford any presumption thereof in the case of a trustee. An executor has, independently of his co-executor, a full and absolute control over the personal assets of the testator, and is competent to give valid discharges by his own separate act. If, therefore, an executor join with a co-executor in a receipt, he does an *unnecessary* act, and will, therefore, be *prima facie* answerable for the application of the fund.<sup>1</sup> In *Westley v. Clarke*,<sup>2</sup> this general rule was thus exemplified. T., one of three executors, had called in a sum of money, secured by mortgage of a term of years, and received the amount, and afterwards, but the same day, sent round his clerk to his co-executors, with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. T. afterwards became bankrupt, and the money was lost, and thereupon a bill was filed to charge the co-executors. Lord Northington said—"If it plainly appears that only one executor received and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason and without being in a capacity to control the act of their co-executor, either before or after the act was done, what ground has any court of conscience to charge them? The only act that affected the assets was the first that discharged the debt." His Lordship

Onus on executor joining in receipt to prove that he did not receive.

<sup>1</sup> Brice v. Stokes, 11 Ves. 319.

<sup>2</sup> 1 Eden, 357.

was therefore of opinion that the executors were not liable for the misapplication by their co-executor.

The rule, as now recognized, is best explained by Lord Redesdale in *Joy v. Campbell*,<sup>1</sup>—"The distinction," he observes, "seems to be this, with respect to mere signing; that if the receipt be given for the purpose of mere form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors."<sup>2</sup>

An express clause is usually inserted in trust-deeds, that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustees, but for his own acts and defaults only. But equity infuses such a proviso into every trust-deed,<sup>3</sup> and a person can have no better right from the expression of that which, if not expressed, would be implied.<sup>4</sup>

The two primary duties of a trustee are, first, to carry out the directions of the person creating the trust, and secondly, to place the trust property in a state of security.

Thus, if a trust-fund be an equitable interest, of which the legal estate cannot at present be transferred to an encumbrancer, it is the trustee's duty to lose no time in giving notice of his own interest to the person in whom the legal interest is vested; for, otherwise, he who created the trust might sub-

True rule as to receipts by executors.

Indemnity clauses,—utility of, in general.

Duties of trustees,—towards securing the trust property.

(1.) Reduction into possession or quasi-possession.

<sup>1</sup> 1 Sch. & Lef. 341.

<sup>2</sup> Walker v. Symonds, 3 Swanst. 1; Hovey v. Blakeman, 4 Ves. 608.

<sup>3</sup> Dawson v. Clarke 18 Ves. 254.

<sup>4</sup> Worrall v. Harford, 8 Ves. 8; Rehden v. Wesley, 29 Beav. 213.

sequently encumber adversely the interest he has settled, in favor of a purchaser without notice, who, by first giving notice to the legal holder, might gain a priority.<sup>1</sup>

If the trust-fund be a chose in action, as a debt which may be reduced into possession, it is the trustee's duty to be active in getting it in, and any unnecessary delay in this respect will be at his own personal risk.<sup>2</sup>

(2.) Realization of moneys outstanding on personal security.

An executor is not to allow the assets of the testator to remain outstanding upon *personal* security, though the debt was a loan by the testator himself on what he deemed an eligible investment.<sup>3</sup> Where the trust-money cannot be applied, either immediately or by a short day, to the purposes of the trust, it is the duty of the trustee to make the fund productive to the *cestui que trust*, by the investment of it on some proper security. The trustee is not justifiable in lending on personal security, however good,<sup>4</sup> unless expressly empowered to do so by the instrument creating the trust.<sup>5</sup>

(3.) Investment of trust-funds in the authorized securities.

[In England by statute certain securities have been designated as lawful investments for trustees—stock of the Bank of England and Ireland, East India stock, real securities, etc.,—unless expressly forbidden by the trust instrument. “In England a trustee must not invest in bank stock or shares of public companies, and the rule is the same in New York and Pennsylvania.”<sup>6</sup> But in Massachusetts the

<sup>1</sup> Jacob v. Lucas, 1 Beav. 436.

<sup>2</sup> Grove v. Price, 26 Beav. 103.

<sup>3</sup> Paddon v. Richardson, 7 De G. M. & G. 563; Clough v. Bond, 3 My. & Cr. 496. [Pray's Appeal, 10 Casey, 100.]

<sup>4</sup> Geaves v. Strahan, 8 De G. M. & G. 291. [Clark v. Ganfield, 8 Allen, 427.]

<sup>5</sup> Paddon v. Richardson, 7 De G. M. & G. 563.

<sup>6</sup> [Ackerman v. Emott, 4 Barb. 626; Worrell's Appeal, 10 Harris, 44].

rule is different.<sup>1</sup> Mortgages on real estate are considered proper investments for trustees in the United States, and in England the investment in such securities is now authorized by statute. In several of the United States the subject of investments by trustees is expressly regulated by statute.<sup>2</sup>]

As a general rule, where a testator subjects the *residue* of his personal estate to a series of limitations directly or by way of trust, without any particular directions as to the investment or mode of enjoyment, there, in the absence of indications of a contrary intention, such part of the residue as may be wearing out (such as leaseholds), must be converted, and put in such a state of investment as to be securely available for all persons interested in it. And if the residue comprises property of a reversionary nature, that also must be converted. The former of these two rules protects the remainderman, the latter of them protects the tenant for life.<sup>3</sup>

When trustees or executors were directed by the will to convert the testator's property, and invest it in Government or real securities, and neglected to do either, it was for a long time a question whether they should be answerable for the principal money with interest, or the amount of stock which might have been purchased at the period when the conversion should have been made, with subsequent dividends, at the option of the *cestui que trust*; or whether they should be charged with the amount of

(4.) Conversion of terminable and reversionary property, comprised in residuary devise or bequest

The limit or measure of trustee's liability for non-investment.

<sup>1</sup> [Harvard College v. Amory, 9 Pick. 446].

<sup>2</sup> [Bisp. Eq. § 141].

<sup>3</sup> 2 Sp. 42, 552, 557; Bate v. Hooper, 5 De G. M. & G. 338; Howe v. Lord Dartmouth, 7 Ves. 137; Porter v. Baddeley, L. R. 5 Ch. Div. 542; Wright v. Lambert, L. R. 6 Ch. Div. 649; and see Macdonald v. Irvine, 8 Ch. Div. 101; Johnson v. Lawson, W. N. 1879, 26.

principal and interest only, without an option to the *cestui que trust* of taking the stock and dividends. It has now been decided that the trustee is answerable only for the *principal money and interest*, and that the *cestui que trust* has no option of taking the stock and dividends. The principle upon which the court proceeds is, that the trustee is liable only for not having done what it was his duty to have done, and the measure of his responsibility is that which the *cestui que trust* must have been entitled to in whatever mode that duty was performed.<sup>1</sup>

Remedies of *cestui que trust* in event of a breach of trust.

It remains to expound the remedies of a *cestui que trust*, and in the first place to inquire into whose hands the estate may be followed.

(1.) Right of following the trust estate.

If the alienee be a volunteer, then the estate may be followed into his hands whether he had notice of the trust or not,<sup>2</sup> and if the alienee be a purchaser of the estate, even for valuable consideration, but with notice, the same rule applies.<sup>3</sup> If, on the contrary, the alienee be a purchaser for valuable consideration, having the legal estate, and without notice, his title, even in equity, cannot be impeached, and he takes the land freed from the trust.<sup>4</sup>

Breach of trust creates a simple contract debt.

The debt created by a breach of trust is regarded only as a simple contract debt, both at law and in equity, even where the trust arises under a deed executed by the trustees, unless the trustee who committed such breach of trust has acknowledged the debt under seal.<sup>5</sup> But the mere acceptance by deed

<sup>1</sup> Robinson v. Robinson, 1 De G. M. & G. 247.

<sup>2</sup> Spurgeon v. Collier, 1 Eden, 55.

<sup>3</sup> Wigg v. Wigg, 1 Atk. 382; Kennedy v. Daly, 1 Sch. & Lef. 345; Daniels v. Davidson, 16 Ves. 249.

<sup>4</sup> Thorndike v. Hunt, 3 De G. & J. 563; Jones v. Powles, 3 My. & K. 581; Pilcher v. Rawlins, L. R. 7 Ch. App. 259; overruling Carter v. Carter, 3 K. & J. 617.

<sup>5</sup> 2 Sp. 936.

of the trust will not create a specialty, unless there be a covenant, express or implied, for payment of the trust-fund.<sup>1</sup>

If the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust estate, so long as the substituted property can be traced.<sup>2</sup>

Money, notes, and bills may be followed by the rightful owner, where they have not been circulated or negotiated, or the person to whom they have passed had express notice of the trust,<sup>3</sup> and the only difference between money on the one hand and notes and bills on the other, is that money is not earmarked, and, therefore, cannot, except under particular circumstances, be traced; but notes and bills, from carrying a number or a date, can in general be identified by the owner without difficulty.<sup>4</sup> The difficulty of identification does not arise, where the trust property is still in the hands of the trustee; because in laying out trust moneys, a trustee must be careful to keep his own property separate from the trust-fund: and if he mix them, the *cestui que trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own.<sup>5</sup>

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<sup>1</sup> Isaacson v. Harwood, L. R. 3 Ch. App. 225; Holland v. Holland, L. R. 4 Ch. 449; and see Butler v. Butler, L. R. 5 Ch. Div. 554; and, on appeal, 7 Ch. Div. 116.

<sup>2</sup> Lewin, 645; Frith v. Cartland, 2 Hem. & M. 417; Ernest v. Croysdill, 2 De G. F. & J. 175; Hopper v. Conyers, L. R. 2 Eq. 549.

<sup>3</sup> Verney v. Carding, cited Joy v. Campbell, 1 Sch. & Lef. 345.

<sup>4</sup> Lewin, 647; Ford v. Hopkins, 1 Salk. 283. [Brocehus v. Morgan, 5 Cent. L. J. 53, and see 5 Cent. L. J. 51, 75].

<sup>5</sup> Lupton v. White, 15 Ves. 432; Mason v. Morley, 34 Beav. 471, 475; see also Hastie v. Hastie, L. R. 2 Ch. Div. 304; *In re Hallett*, W. N. 1879, p. 146; and disting. Fox v. Buckley, L. R. 3 Ch. Div. 508.

(2.) Right of following the property into which the trust-fund has been converted.

When money, notes, &c., may be followed.

Interest payable  
by trustees on a  
breach of trust.

It may be stated as a general rule, that if a trustee be guilty of any unreasonable delay in investing or transferring the fund, he will be answerable to the *cestui que trust* for interest during the period of his laches.<sup>1</sup>

Acquiescence.

The remedy of a *cestui que trust* against his trustee for breach of trust of any sort may be barred by the concurrence of the *cestui que trust*, or by his acquiescence, or by his executing a release.<sup>2</sup>

Persons under  
disability.

Persons under disability, as married women,<sup>3</sup> or infants,<sup>4</sup> who have concurred in a breach of trust, may nevertheless proceed against the trustees, except where they have by their own fraud induced the trustees to deviate from the proper performance of their duties; and even in that excepted case, married women, at least, may occasionally proceed successfully against the trustee whom they have induced to deviate from his duties,—*e. g.*, where the trust is for the separate use of the married woman without power of anticipation.<sup>5</sup>

Release and con-  
firmation.

A *cestui que trust* may, by a release or confirmation, prevent himself from taking proceedings against trustees for a breach of trust,<sup>6</sup> but neither will be binding on him unless he had a full knowledge of the facts of the case.<sup>7</sup>

<sup>1</sup> *Stafford v. Fiddon*, 23 Beav. 386. [Norris' Appeal, 21 P. F. Smith, 123].

<sup>2</sup> *Brice v. Stokes*, 2 Smith L. C. 877; *Harden v. Parsons*, Eden, 145; *Burrows v. Walls*, 5 De G. M. & G. 233; *Farrant v. Blanchford*, 1 De G. J. & Sm. 107, 119.

<sup>3</sup> *Parkes v. White*, 11 Ves. 221.

<sup>4</sup> *Wilkinson v. Parry*, 4 Russ. 276.

<sup>5</sup> *Savage v. Foster*, 9 Mod. 35; *Wright v. Snowe*, 2 De G. & Sm. 321; *In re Lush's Trusts*, L. R. 4 Ch. App. 591; *Stanley v. Stanley*, 26 W. R. 310; 7 Ch. Div. 589.

<sup>6</sup> *French v. Hobson*, 9 Ves. 103.

<sup>7</sup> *Lloyd v. Attwood*, 3 De G. & J. 650; *Kay v. Smith*, 21 Beav. 522; *Burrows v. Walls*, 5 De G. M. & G. 254.



A trustee is entitled to have his accounts examined and to have a settlement of them. If the *cestui que trust* being *sui juris*, is satisfied that nothing more is due to him, he ought to close the account, and give an acknowledgment equivalent to a release. On the other hand, if the *cestui que trust* is dissatisfied with the accounts, he ought to have the accounts taken. He is bound to adopt one of these two courses; he is not at liberty to keep a chancery suit hanging for an indefinite time over the head of the trustee.<sup>1</sup>

Usually settled accounts are not opened (*i. e.*, <sup>Surcharging and falsifying.</sup> taken over again throughout, or *in toto*); but in an action for an account, when the plea of settled accounts is put forward in defence, the practice of the court is, upon proof of one clear omission or insertion that is erroneous, to give liberty to the plaintiff to *surcharge* the omission and to falsify the *insertion*, together with all other erroneous omissions and insertions; and this liberty is commonly called "liberty to surcharge and falsify."<sup>2</sup>

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<sup>1</sup> 2 Sp. 46, 47, 921.

<sup>2</sup> *Heighington v. Grant*, 1 Phil. 601; *Pit v. Cholmondeley*, 2 Ves. Sr. 565; *Coleman v. Mellersh*, 2 M. & G. 309, 314; *Drew v. Power*, 1 Sch. & Lef. 182; and *disting. Blagrove v. Routh*, 2 K. & J. 509, 522; and *Watson v. Rodwell*, 7 Ch. Div. 625; 11 Ch. Div. 150.

## CHAPTER VII.

## DONATIONES MORTIS CAUSA.

Essentials of (1.)  
Must be made in  
expectation of  
death.

It is essential to a valid *donatio mortis causa* that it should be made "in such a state of illness or expectation of death, as would warrant a supposition that the gift was made in contemplation of that event."<sup>1</sup>

(2.) On condition  
to be absolute on  
donor's death.  
Revoked by re-  
covery or re-  
sumption.

A *donatio mortis causa* is always made on the condition, expressed or implied, that the gift shall be absolute only in case of the donor's death, and shall therefore be revocable during his life.<sup>2</sup> And if the donor recover from his illness, or if he resume the possession of the gift, it will be defeated.<sup>3</sup> In *Staniland v. Willot*,<sup>4</sup> the plaintiff, being possessed of shares in a public company, transferred them when in a state of extreme illness, into the name of the defendant; the plaintiff having recovered, but having subsequently become a lunatic, a bill was filed in his name by his committee to have

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<sup>1</sup> Edwards v. Jones, 1 My. & Cr. 233; Duffield v. Elwes, 1 Bligh. N. S. 530. [Gourley v. Linsenbergler, 51 Pa. St. 345].

<sup>2</sup> Edwards v. Jones, 1 My. & Cr. 233. [Baskett v. Hassell, 107 U. S. 602].

<sup>3</sup> Ward v. Turner, 1 Sm. L. C. 983; Bunn v. Markham, 7 Taunt. 231.

<sup>4</sup> 3 Mac & G. 664.

the defendant declared a trustee of the shares. It was held that the plaintiff having survived the sickness during which the transfer was made, the gift could not operate as a *donatio mortis causa*; and it appearing that the defendant had received the gift on the distinct understanding that it was to be absolute only in the event of the plaintiff's death, the defendant was held a trustee of the shares for the plaintiff.

In addition to the two before-mentioned requisites, there is a further and all-essential requisite, viz., delivery.<sup>(3.) Delivery essential.</sup><sup>1</sup> For, if the intention be expressed in writing, but no delivery takes place, even though the document be signed by the donor, it will be ineffectual as a *donatio mortis causa*, for in fact it is a legacy, and the writing will be held a testamentary document, and therefore, if not attested by two witnesses, as directed by the Wills Act,<sup>2</sup> it will be void as a testamentary document.<sup>3</sup> And although it might possibly be good as a declaration of trust,<sup>4</sup> still that is not at all likely, at least in the general case; for what is clearly intended to operate in one way and fails to do so, is not, as a rule, construed by the court to operate in another way—in favor of a volunteer. And if the gift is made by parol, without delivery of the article, it will be equally ineffectual as a *donatio mortis causa*, nor can it possibly operate in such a case, either as a gift *inter vivos*, or as a testamentary disposition.<sup>5</sup>

*Donationes mortis causa* are not void by the Wills Acts;<sup>6</sup> they are not, in fact, testamentary dispositions at all.

<sup>1</sup> [Hanson v. Millett, 55 Me. 184].

<sup>2</sup> 1 Vict. c. 26.

<sup>3</sup> Rigden v. Vallier, 2 Ves. Sr. 258; Tapley v. Kent, 1 Rob. 400.

<sup>4</sup> Morgan v. Malleson, L. R. 10 Eq. 475.

<sup>5</sup> Tate v. Gilbert, 2 Ves. Jr. 120.

<sup>6</sup> 1 Vict. c. 26; Moore v. Darton, 4 De G. & Sm. 519.

Imperfect testamentary gift,—not supported as a *donatio mortis causa*.

If a donor intends to make a testamentary gift which turns out to be ineffectual, it will not be supported as a *donatio mortis causa*. Thus in *Mitchell v. Smith*,<sup>1</sup> A. put into the hands of B. certain promissory notes, saying, “I give you these notes.” A., on being reminded that they wanted indorsement, indorsed them in the presence of a witness as follows:—“*I bequeath, pay the within contents to B. or his order at my death.*” Turner, L. J., said, that the indorsement of a promissory note, in order to be effectual, must be such as to enable the indorsee to negotiate the note. It was clear, however, that B. was not intended to have the power of doing this during the testator’s life. The language of the indorsement and the evidence showed that a testamentary disposition was intended; and as this was invalid, B. could not take.

Ineffectual gift *inter vivos*, not supported as a *donatio mortis causa*.

So also if the donor intends to make a gift *inter vivos* which is ineffectual, it cannot be supported as a *donatio mortis causa*. Thus, in *Edwards v. Jones*,<sup>2</sup> the obligee of a bond, five days before her death, signed a memorandum, *not under seal*, which was indorsed upon the bond, and which purported to be an assignment of the bond without consideration, to a person to whom the bond was at the same time delivered. The circumstances of the transaction did not constitute, in the opinion of the court, a *donatio mortis causa*. It was also held that the gift was incomplete, and as it was without consideration, the court could not give effect to it. “It is argued,” said the learned judge, “that the bonds were delivered either by way of *donatio mortis causa*, or as a gift *inter vivos*. Now, in order to be good as a *donatio mortis causa*, the gift must have been made in contemplation of death, and intended

<sup>1</sup> 12 W. R. 941.

<sup>2</sup> 1 My. & Cr. 226.

to take effect only after the donor's death. If it appeared, however, from the circumstances of the transaction, that the donor really intended to make an immediate and irrevocable gift of the bonds, that would destroy the title of the party who claims them as a *donatio mortis causa*.

"In the present case the transaction is in writing, and this is a strong circumstance against the presumption of its being a *donatio mortis causa*. Here is an instrument purporting to be a regular assignment exactly in the same form as where the purpose is absolutely and at once to pass the whole interest in the subject-matter. A party making a *donatio mortis causa* does not part with his whole interest, save only in a certain event; and it is of the essence of the gift that it shall not otherwise take effect. Such a gift leaves the whole title in the donor, unless the event occurs which is to divest him. Here, however, there is an attempted actual assignment by which the donor transfers all her right, title, and interest to her niece.

"The transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, the question comes to be, whether the mere handing over of the bond would constitute a good gift *inter vivos*. This is a purely voluntary gift, and cannot be made effectual without the interposition of the court. This court will not aid a volunteer to carry into effect an imperfect gift."

If a personal chattel be actually given by the donor himself to the donee, or by some other person at the donor's request, into the hands of the donee, or to some other person as trustee or agent for the donee, a good delivery is constituted. In *Farquharson v. Cave*,<sup>1</sup> it was held that a mere delivery to an agent, in the character of an agent for

What is a sufficient delivery.  
(a.) To donee or donee's agent.

<sup>1</sup> 2 Coll. Ch. Ca. 367.

(b.) Delivery of effective means of obtaining the property.

the donor, would amount to nothing; it must be a delivery to the donee, or to the donee's agent.<sup>1</sup> Where the chattel itself has not been delivered, it would seem that the delivery of some effective means of obtaining it, would be sufficient, though not the delivery of a mere ineffectual symbol.<sup>2</sup>

If the thing given as a *donatio mortis causa* be not a chattel in possession, but a chose in action, delivery of some document essential to the recovery of the chose in action is sufficient. Thus in *Moore v. Darton*,<sup>3</sup> where, on a loan, the borrower had given the lender a receipt in the following terms:—"Received of Miss D. £500, to bear interest at five per cent. per annum," it was held that a delivery of the receipt to an agent of the borrower by the creditor on her deathbed, stating that she wished the debt to be cancelled, was a good *donatio mortis causa*.

Examples of imperfect delivery.  
(a.) Delivery to donor's agent.

In *Jones v. Selby*,<sup>4</sup> the delivery of the key of a box was held to be a sufficient *donatio mortis causa* of its contents. In *Trimmer v. Danby*,<sup>5</sup> upon the death of a testator, ten Austrian bonds were found, amongst other securities, in a box at his house, with the following indorsement:—"The first five numbers of these Austrian bonds belong to and are H. D.'s property," signed by the testator. H. D. was the testator's house-keeper, and the key of the box was given into her custody. It was held, that as there had been no actual transfer or delivery into the hands of H. D., the bonds still remained part of the testator's assets, the court being of opinion that the testator gave the key to H. D. in her char-

<sup>1</sup> *Moore v. Darton*, 4 De G. & Sm. 517.

<sup>2</sup> *Ward v. Turner*, 1 Sm. L. C. 983; *Snellgrove v. Baily*, 3 Atk. 214. [*Tillinghast v. Wheaton*, 8 R. I. 536].

<sup>3</sup> 4 De G. & Sm. 519.

<sup>4</sup> *Prec. in Ch.* 300.

<sup>5</sup> 25 L. J. Ch. 424.

acter of housekeeper, and for the purpose of taking care of it for his benefit; the court at the same time assenting that the testator meant to give the bonds to H. D., and that the bonds were capable of being transferred by hand, but maintaining that in cases of this nature it must be proved that there has been an actual transfer of the property, and that everything has been done that is capable of being done to effect that transfer<sup>1</sup>—the mere intention to transfer not being efficacious in favor of a volunteer.

Not only must possession be given to the donee, but the donor must part with all dominion over the gift. Thus, in *Hawkins v. Blewitt*,<sup>2</sup> A., being in his last illness, ordered a box containing wearing apparel to be carried to the defendant's house to be delivered to the defendant, giving no further directions respecting it. On the next day, the defendant brought the key of the box to A., who desired it to be taken back, saying, he should want a pair of breeches out of it. *Held*, not to be a good *donatio mortis causa*, and the learned judge said, "In the case of a *donatio mortis causa*, possession must be immediately given; and also in parting with the possession, it is necessary that the donor should part with the dominion over it. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself." (b.) Delivery to donor's agent, coupled with retention of ownership.

In connection with the two last-mentioned cases, it should also be borne in mind, that the word "housekeeper" is often a euphemism for females that are not only volunteers, but immoral and greedy persons, and whom, therefore, the court is not well-disposed towards.

<sup>1</sup> Powell v. Hellicar, 26 Beav. 261.

<sup>2</sup> 2 Esp. 663.

What may be  
given as *donationes mortis causa*.

There cannot, it seems, be a good *donatio mortis causa* of railway stock;<sup>1</sup> nor of the donor's own cheque upon a banker,<sup>2</sup> unless cashed in his lifetime or otherwise negotiated.<sup>3</sup> There may be a good *donatio mortis causa* of a bond.<sup>4</sup> The delivery of the mortgage-deeds of real estate will constitute a valid *donatio mortis causa*.<sup>5</sup> So also will the delivery of a promissory note, payable to order, though not indorsed.<sup>6</sup>

How it differs  
from a legacy,  
and agrees with a  
gift *inter vivos*.

A good *donatio mortis causa* partakes partly of the character of a gift *inter vivos* and partly of that of a legacy. It differs from a legacy, and resembles a gift *inter vivos* in these respects,—1. It takes effect *sub modo* from the delivery in the lifetime of the donor, and therefore cannot be proved as a testamentary act. 2. It requires no assent or other act on the part of the executor or administrator to

How it resembles  
a legacy and differs  
from a gift  
*inter vivos*.

perfect the title of the donee. It differs from a gift *inter vivos*, and resembles a legacy in these respects,—1. It is revocable during the donor's lifetime.<sup>7</sup> 2. It may be made even at law to the donor's wife.<sup>8</sup> 3. It is liable to the debts of the donor on a deficiency of assets.<sup>9</sup>

<sup>1</sup> Moore v. Moore, L. R. 18 Eq. 474.

<sup>2</sup> Tate v. Hilbert, 4 Bro. C. C. 286; Boutts v. Ellis, 4 De G. M. & G. 249; Hewitt v. Kaye, L. R. 6 Eq. 198.

<sup>3</sup> Rolls v. Pearce, L. R. 5 Ch. Div. 730.

<sup>4</sup> Snellgrove v. Baily, 3 Atk. 214; Gardner v. Parker, 3 Mad. 184. [Lee v. Boak, 11 Gratt. 182].

<sup>5</sup> Duffield v. Elwes, 1 Bligh. N. S. 497.

<sup>6</sup> Veal v. Veal, 27 Beav. 303. [Coutant v. Schuyler, 1 Paige, 316.]

<sup>7</sup> Smith v. Casen, cited 1 P. W. 406; Jones v. Selby, Prec. Ch. 300.

<sup>8</sup> Tate v. Leithead, Kay, 658.

<sup>9</sup> Smith v. Casen, cited 1 P. W. 406.



## CHAPTER VIII.

## LEGACIES.

No suit will lie at the common law to recover legacies, unless the executor has assented thereto,<sup>1</sup> or unless the action should be by a legatee against the executors and a debtor as co-defendants, where the executors refuse to sue the debtor.<sup>2</sup> But in cases of specific legacies of goods, after the executor has assented thereto, the property vests immediately in the legatee, who may maintain an action at law for the recovery thereof.<sup>3</sup> It is not difficult to see the reason why it is inexpedient that courts of law should have jurisdiction over legacies. Courts of law cannot (or at all events until recently could not), whereas the courts of equity always could and can, impose such terms as justice may require, upon the parties recovering those legacies; so that, for instance, an action at law might be (or at all events until recently might have been) maintained by a husband, for a legacy given to his wife, without making any provision for her, or for her

Suits for legacies only in equity unless executor assents.

Reasons.

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<sup>1</sup> Deeks v. Strutt, 5 T. R. 690.

<sup>2</sup> Yeatman v. Yeatman, 7 Ch. Div. 210; Travis v. Milne, 9 Hare, 141.

<sup>3</sup> Doe v. Gay, 3 East, 120.

family ; whereas, a court of equity would require such a provision to be made.

Equity jurisdiction.—When exclusive.

Where the bequest of a legacy involves the execution of a trust, express or implied, or the legacy is charged on land, or the other courts cannot take due care of the interests of all parties, courts of equity will exert an exclusive jurisdiction. And even where the executor has assented to the legacy,

When concurrent courts of equity will now exercise a concurrent jurisdiction with the other courts over legacies ; because the executor is treated as a trustee for the benefit of the legatees, a universal ground for the interposition of equity,<sup>1</sup> and also, because the aid of equity may be required to obtain discovery, account, or distribution of assets, or some other mode of relief which other courts are, or were, incompetent to afford.

[For the reasons, first, because its relief was more complete, being able to supply what the common law courts lacked, and, secondly, because the relation between the executor or administrator and the parties interested in the estate, was really one of trust, the equity jurisdiction over the estates of deceased persons became at last practically exclusive.

Divested in the United States by the Probate Courts.

“Throughout the great majority of the United States, however, this jurisdiction of equity, even when not expressly abrogated, has become virtually obsolete. Partly from prohibitory and partly from permissive statutes, the jurisdiction over the administration of decedents estates in all ordinary cases has been wholly withdrawn from the equity tribunals, and exclusively exercised by the Probate Courts in all the States, with very few exceptions. Although the general jurisdiction of equity over the subject of administration is thus practically and

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<sup>1</sup> Hurst v. Beach, 5 Madd. 360.

even in some instances expressly abolished in so many States, still the jurisdiction remains in all matters of trust created by or arising from the provisions of wills; and thus a large field is left for the exercise of the equitable jurisdiction in the construction of wills and in the determination and enforcement of equitable rights, interests and estates, created and conferred thereby<sup>1</sup>.”]

Bequests, or legacies, may be classed under three heads,—general, specific, and demonstrative. A <sup>Division of legacies.</sup> legacy is general, where it does not amount to a <sup>1. General.</sup>

bequest of any particular thing as distinguished from all others of the same kind. Thus, if a testator gives A. a diamond ring, or £1000 stock, or a horse, not referring to any particular diamond ring, stock, or horse, these legacies will be general.<sup>2</sup> The terms, “pecuniary legacies” and “general legacies,” are commonly used as synonymous, although “pecuniary legacy,” strictly speaking, means only “a legacy of money,” and may therefore be either “specific” or “general.”<sup>3</sup>

A legacy is specific, when it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind. Thus, if a testator gives B. “my diamond ring,” “my black horse,” “my £1000 stock,” or “£1000 contained in a particular bag,” or “owing to me by C,” in these and the like instances, the legacies are specific.<sup>4</sup>

A legacy is *demonstrative*, when “it is in its nature a general legacy, but there is a particular fund <sup>3. Demonstrative</sup>

<sup>1</sup> Pom. Eq. Jur. § 166.

<sup>2</sup> [Tifft v. Porter, 8 N. Y. 516].

<sup>3</sup> 1 Rep. Leg., by White. 191, n; Hawthorne v. Shedden, 3 Sm. & G. 293; Fielding v. Preston, 1 De G. & J. 438.

<sup>4</sup> Stephenson v. Dowson, 3 Reav. 342; Manning v. Purcell, 7 De G. M. & G. 55. [Bland v. Mayo, 4 Md. Ch. 484].

pointed out to satisfy it.”<sup>1</sup> Thus, if a testator bequeaths £1000 out of his reduced Bank Three Per Cents., the legacy will not be specific, but demonstrative.<sup>2</sup>

Distinctions.

It is a matter of great practical importance to distinguish these three different species of legacies one from the other. The chief points of difference are these:—1. If, after payment of debts, there is a deficiency of assets for payment of all the legacies, a general legacy will be liable to abate, but a specific legacy will not. 2. On the other hand, if a specific bequest is made of a chattel or a fund, which fails by alienation during the testator’s lifetime, or otherwise, the legatee will not be entitled to any compensation out of the general personal estate of the testator; because nothing but the specific thing is given to the legatee.<sup>3</sup> 3. But with regard to a demonstrative legacy, it is so far of the nature of a specific legacy, that it will not abate with the general legacies, until the fund out of which it is payable is exhausted, and it is also so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the property pointed out as the means of paying it,<sup>4</sup> that being only the primary fund for payment.

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<sup>1</sup> *Ashburner v. Macguire*, 2 L. C. 236; *Robinson v. Geldard*, 3 Mac. & G. 735. [*Smith v. Lampton*, 8 Dana, 69].

<sup>2</sup> *Sparrow v. Josselyn*, 16 Beav. 135.

<sup>3</sup> 1 *Rop. Leg.*, by White, 191-2; *Brown’s Dict.*, title Legacies.

<sup>4</sup> *Rop. Leg.*, by White, 237; see generally, *Mullins v. Smith*, 1 Drew. & Sm. 210; *Vickers v. Pound*, 6 H. L. Cas. 885. [*Geddings v. Seward*, 16 N. Y. 365].

## CHAPTER IX.

## CONVERSION.

“Nothing is better established than this principle, General rule.  
 “that money directed to be employed in the pur- Money into land.  
 “chase of land, and land directed to be sold and  
 “turned into money, are to be considered as that Land into money.  
 “species of property into which they are directed  
 “to be converted, and this in whatever manner the  
 “direction is given, whether by will, or by contract,  
 “or in marriage articles or marriage settlement, or  
 “otherwise ; and whether the money is actually paid  
 “or only covenanted to be paid ; and whether the  
 “land is actually conveyed, or only agreed to be  
 “conveyed, the owner of the fund, or the contract-  
 “ing parties, may make land money, or money  
 land.”<sup>1</sup>

This notional conversion of land into money, or Conversion.  
 of money into land, may arise in two ways ; *firstly*,  
 under wills ; *secondly*, under deeds. It is proposed By will or settle-  
ment.  
 to treat the subject under the following heads,—  
 distinguishing between deeds and wills :—

1. What words are sufficient to produce conver-  
sion ;
2. From what time conversion takes place ;

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<sup>1</sup> Fletcher v. Ashburner, 1 Smith L. C. 898.

3. The general effects of conversion ; and

4. The results of a total or partial failure of the objects and purposes for which conversion has been directed.

What words are sufficient.  
The direction to convert must be imperative.  
(1.) Express;

1. *What words are sufficient to produce conversion.*

The direction to convert either money into land, or land into money, must be imperative ; for if the direction to convert be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found.<sup>1</sup> Thus, in *Curling v. May*,<sup>2</sup> A. gave £500 to B, in trust, that B. should lay out the same upon a purchase of lands, *or* put the same out on good securities, for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors, and administrators, and died in 1729. In 1731, H., the daughter, died, without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H., and the money was decreed to the husband-administrator ; for the wife not having signified any intention of a preference, the court would take the money as it was found ; if the wife had signified any intention, that intention would have been observed, but it was not reasonable at that time to give either her heir, or her administrator, or the trustee the liberty to elect ; for Lord Talbot said, it was originally personal estate, and yet remained so, and nothing could be collected from the will as to what was the testator's principal intention.<sup>3</sup>

<sup>1</sup> [Peterson's Appeal, 88 Pa. St. 397 ; Hood v. Hood, 85 N. Y. 561].

<sup>2</sup> Cited 3 Atk. 255.

<sup>3</sup> Bourne v. Bourne, 2 Hare, 35.

But although the conversion is apparently optional, as where trustees are directed to lay out personality, "either in the purchase of lands of inheritance, or at interest," or "in land or some other securities," as they shall think most fit and proper, yet if the limitations and trusts of the money directed to be laid out are only adapted to real estates, so as to denote the testator's intention that land shall be purchased, this circumstance will outweigh the presumed option, and the money will be considered land.<sup>1</sup> And, of course, the like rule will apply to the converse case, *i. e.*, when the limitations are (although they seldom are) exclusively applicable to personal estate. In short, in any case where it is clear that a testator, whatever may be the language he has used, intended that a conversion should take place at all events, equity holding the doctrine that the intent rather than the form is to be considered, will direct that the property should be converted in accordance with the testator's wishes.<sup>2</sup>

2. *Time from which conversion takes place.*

Subject to the general principle that the terms of each particular instrument must guide in the construction and effect of that instrument,<sup>3</sup> the rule is that in regard to wills, conversion takes place as from the death of the testator,<sup>4</sup> and as to deeds or other instruments *inter vivos*, that it takes place as from the date of execution.

Or (2.) Implied, *e. g.*, where limitations are adapted only to land, or *vice versa*.

Time from which conversion takes place.

In wills from testator's death.

Deeds from execution and delivery.

<sup>1</sup> Earlom v. Saunders, Amb. 241. [Power v. Cassidy, 79 N. Y. 602].

<sup>2</sup> Thornton v. Hawley, 10 Ves. 129; Grieveson v. Kirsopp, 2 Kee. 653; Davies v. Goodhew, 6 Sim. 585; Burrell v. Baskerfield, 11 Beav. 525. [Page v. Page, 10 N. J. (Eq.) 365; Dodge v. Williams, 46 Wis. 70].

<sup>3</sup> Ward v. Arch, 15 Sim. 389.

<sup>4</sup> Beauclerk v. Mead, 2 Atk. 167. [Fisher v. Banta, 66 N. Y. 468; Jones v. Caldwell, 97 Pa. St. 42].

Time from which  
conversion takes  
place in a deed,—  
*Griffith v. Ricketts*.

As regards the time from which, in the absence of special circumstances, conversion takes place in the case of a deed, some observations of the court, in *Griffiths v. Ricketts*,<sup>1</sup> are important. There a settlor conveyed the equity of redemption of real estate to trustees for sale for the benefit of his creditors, and on trust, if there should be any surplus, to pay the same to him, his executors, administrators, &c., to and for his and their own absolute use and benefit. *Held*, that this was a conversion of the real estate into personalty, as between the real and personal representatives of the settlor, on the following reasoning:—"A deed differs from a will in this material respect; the will speaks from the death, the deed from delivery. If then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and consequently at the time of his death. The principle is the same in the case of a deed as in the case of a will; but the application is different, by reason that the deed converts the property in the lifetime of the author of the deed, whereas in the case of a will, the conversion does not take place until the death of the testator; and there is no principle on which the court, as between the real and personal representatives (between whom there is confessedly no equity), should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs."

*Clarke v. Franklin*,  
—to same effect.

This rule was further illustrated in the case of *Clarke v. Franklin*.<sup>2</sup> There a settlement was executed of real estate, by deed (not enrolled), to the

<sup>1</sup> 7 Hare, 311.

<sup>2</sup> 4 K. & J. 257.



use of the settlor for life, with remainder (subject to a power of revocation never exercised) to the use of trustees and their heirs, upon trust to sell and pay certain sums of money to persons named, or to such of them as might be living at the settlor's death, and to apply the residue to charitable purposes. Some of the persons named survived the settlor, so that the purposes for which conversion was directed did not fail altogether, but the deed was void so far as it directed the proceeds of land to be applied to charitable purposes; and the question was, whether, under the circumstances, the surplus belonged to the heir or to the next of kin of the settlor. Vice-Chancellor Wood following *Hewitt v. Wright*,<sup>1</sup> held that *notwithstanding the trust for sale was not to arise until after the settlor's death*, the property was impressed with the character of personalty immediately upon the execution of the deed, and that the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personalty, and were, of course, upon his death distributable accordingly.

But although it is true, as a general rule, that in a deed conversion takes place from the date of its execution, caution is required in applying that rule to instruments, such as mortgage deeds, where the general intention of the author of the trust is neither to convert nor to alter the devolution of the property, but merely to raise money. Thus in *Wright v. Rose*<sup>2</sup> A. being seized in fee of a freehold estate, borrowed £300 from B. the defendant, and secured the repayment of it with interest, by executing a mortgage deed of the estate, with power of sale, and by the terms of the deed it was provided that the surplus moneys to arise from the

Rule as to deeds inapplicable when conversion is not the object.

As in mortgages.

<sup>1</sup> 1 Bro. C. C. 86.

<sup>2</sup> 2 Sim. & St. 323.

sale, in case the same should take place, should be paid to A., his *executors* or *administrators*. A. died intestate, and without ever having been married. All the interest due on the mortgage-money had been duly paid by him up to the time of his death, but the principal remained unpaid. The interest that accrued due after his death having remained unpaid, B. the mortgagee entered into possession, and afterwards sold the estate under the power of sale for a sum which greatly exceeded the mortgage money and interest. The question was whether the surplus of the purchase-moneys was real or personal estate. Sir J. Leach held that it was real estate on the following grounds:—"If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus moneys would have been personal estate of the mortgagor, and the plaintiffs (the next of kin of the mortgagor) would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce.<sup>1</sup>

Conversion depending on a future option to purchase.

Closely connected in appearance with the class of cases just referred to, though differing from them in important essentials, are those cases where the conversion depends on an option to purchase to be exercised at a future time. Thus in *Lawes v. Bennett*,<sup>2</sup> A. made a lease to B. for seven years, and on the lease was indorsed an agreement that if B. should within a limited time be minded to purchase the inheritance of the premises for £3000, A. would convey them to B. for that sum. B. assigned to C. the lease, and the benefit of this agreement. A.

(a.) Option created previously to will.—(1.) General devise.  
*Lawes v. Bennett*.

<sup>1</sup> See *Bourne v. Bourne*, 2 Hare, 35.

<sup>2</sup> 1 Cox, 167; see *Edwards v. West*, 7 Ch. Div. 588; *Reynard v. Arnolds*, L. R. 10 Ch. App. 386. [*D'Arras v. Keyser*, 26 Pa. St. 249].

died, and by his will gave all his *real* estate generally to D. and all his *personal* estate to D. and E. Within the limited time, but after the death of A., B. claimed the benefit of the agreement from D., who accordingly conveyed the premises to C. for £3000. *Held*, that the sum of £3000, when paid, was part of the *personal* estate, and that E. was entitled to one moiety of it as such. "It is very clear," observed the Master of the Rolls, "that if a man seized of real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of B. whether it shall be real or personal. It seems to me to make no distinction at all. . . . When the party who has the power of electing has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal, at a future period." Until, however, in such a case the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate.<sup>1</sup>

Rents until option is exercised go as realty.

A similar question sometimes arises, where a testator devises lands over which a third party has a right at his option to purchase, whether, when such option is exercised, the purchase-money is to be bound by the same limitations as the real estate for which it has been substituted, or whether it is to follow the destination of the personal property of the testator. Thus in the case of *Drant v. Vause*,<sup>2</sup> under a lease for years, the lessees had an option to purchase the fee-simple of the demised lands. After the date of the lease, the lessor made his

2. Specific devise, —*Drant v. Vause*.

<sup>1</sup> *Townley v. Bedwell*, 14 Ves. 591; *Ex parte Hardy*, 30 Beav. 206.

<sup>2</sup> 1 Y. & C. C. C. 580.

will, whereby he devised the lands, *specifically* describing them, to G. for life, with remainders over. After the testator's death, the lessees elected to purchase the fee-simple of the lands. *Held*, on the special terms of the will, that the purchase-money did not fall into the residue of the personal estate, but was subject to the same limitations as had been declared concerning the purchased lands, and therefore that G. took a life interest in the purchase-money.<sup>1</sup> It must be observed that in the above case, after the testator had made the agreement, he *specifically* and *in express terms* devised the lands, on certain limitations, from which it might be inferred that he intended that, at all events, the land or its value, in case the option should be exercised, should go to certain persons. It will be seen, therefore, on principle that in a similar case of agreement first, and will afterwards, if the will do not *specifically* refer to the property so agreed to be sold, no such intention will be inferred, and when the option is exercised, the purchase-money will fall into the personalty. This point was decided in *Collingwood v. Row*,<sup>2</sup>—and also substantially in the before-stated case of *Lawes v. Bennett*.

(b.) Option created subsequently to will.

(1.) General devise.

(2.) Specific devise,—*Weeding v. Weeding*.

In the case of *Weeding v. Weeding*,<sup>3</sup> the testator *after* making a will devising a specific estate and bequeathing the residue of his personal estate to other persons, entered into a contract, giving an option of purchase over part of the specific real estate, which option was exercised after his death. *Held*, that the property was converted from the date of the exercise of the option, and went to the residuary legatees. V. C. Wood made the following observations:—"The testator must be presumed to know

<sup>1</sup> *Emuss v. Smith*, 2 De G. & Sm. 722.

<sup>2</sup> 5 W. R. 484.

<sup>3</sup> 1 J. & H. 424.

the law. With this knowledge he makes a will devising real estate in one way, and giving his personal estate upon different trusts. After this, he makes a contract, the effect of which he knows will be to give a third person the power of saying, at a future time, whether a certain portion of what was then his real estate shall be realty or personalty. You cannot assume an intention that the property, in any event, is to be divided in the particular proportions as to value, which existed at the date of the will. I understand the principle on which the cases of *Drant v. Vause* and *Emuss v. Smith* were decided, to be this: when you find that in a will made *after* a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the *specific* property which is the subject of the contract, without referring in any way to the contract he has entered into, there it is considered that there is a sufficient indication of an intention to pass that property, to give to the devisee all the interest, whatever it may be, that the testator had in it.

“But the case is very different, when, after having given the property by will, the testator makes a sale of it. If it is a sale out and out, there is no question that the devisee’s interest is taken away. Here the testator first gives the Kentish Town estate to certain devisees, and his personalty to other persons. After that, a part of the estate ceases to be Kentish Town estate, and becomes personalty. There is no republication of the will after the contract by which this change would, in a certain contingency, be brought about. The intention is, that all the Kentish Town property is to go one way, all the personalty another. The testator must be taken to have known when he had entered into the contract that what would ultimately be Kentish Town

estate would depend on the option of the lessee; and the inference is, that he meant his property to go according to the state to which it would be reduced by the exercise of that option."<sup>1</sup>

Where the devise of real estate is general and not specific, the rule of *Weeding v. Weeding*, to the effect that there is a taking away or ademption of the property from the devisee, when the subsequently created option is subsequently exercised, would undoubtedly apply, and would *a fortiori* apply, a general devisee being always less favored than a specific one.

Where purpose subsequently fails, property is reconverted.

There is also another class of cases where conversion may have been directed or agreed upon, yet from the course of *subsequent events* it may be a question whether such constructive conversion has not ceased, so as that the heir and next of kin are restored to their original rights. The principles which govern these cases will be treated of hereafter in the chapter on reconversion.

The effects of conversion.

### 3. *As to the effects of conversion.*

These have been generally stated to be, to make personal estate real, and real estate personal.

Money directed to be turned into land descends to the heir,<sup>2</sup> and land directed to be converted into money goes to the personal representatives.<sup>3</sup>

4. Results of total or partial failure.

### 4. *The results of a total or partial failure of the purposes for which conversion is directed.*

(A.) Total failure—in deeds and in wills indifferently

*As to total failure.* The universal rule may be thus stated—that where a conversion is directed or agreed upon, whether by *will* or by *settlement*, or *other instrument inter vivos*, *whether of money into*

<sup>1</sup> *Goold v. Teague*, 7 W. R. 84; *Woods v. Hyde*, 10 W. R. 339; and see *Frewen v. Frewen*, L. R. 10 Ch. App. 610.

<sup>2</sup> *Scudamore v. Scudamore*, Prec. in Ch. 543. [*Hawley v. James*, 5 Paige, 318; *Taylor v. Johnston*, 63 N. C. 381.]

<sup>3</sup> *Ashby v. Palmer*, 1 Mer. 296; *Elcott v. Fisher*, 12 Sim. 505. [*Re Dobson*, 11 Phila. 81].

*land, or of land into money*, if the objects and purposes for which that conversion was intended have totally failed *before the instrument directing the conversion comes into operation*, no conversion will take place, but the property so directed or agreed to be converted will remain in its original state, or rather, will result to the testator or settlor with its original form unchanged.<sup>1</sup> In the words of Wood, V. C., in the case of *Clarke v. Franklin*,<sup>2</sup> “So here, if at the moment when the grantor put his hand to this deed, the purpose for which conversion was directed had failed, for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been *at home* in his lifetime, the court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate.”<sup>3</sup>

The property results unconverted.

Where the purposes for which conversion is directed have *partially failed* before the instrument directing the conversion has come into operation, the rules are somewhat complex, and it will be necessary to deal *seriatim* with the cases, regard being had to the nature of the instrument by which such conversion is directed. (B.) Partial failure.

#### I. Cases under wills:—

I. Under wills.

(a.) Of land into money.

(b.) Of money into land.

#### II. Cases under settlements or other instruments *inter vivos*:—

II. Under instruments *inter vivos*.

(a.) Of land into money.

(b.) Of money into land.

With reference to each of these four cases, three questions will arise—

<sup>1</sup> [*Slocum v. Slocum*, 4 Edw. Ch. 613; *Morrow v. Brenizer*, 2 Rawle, 184; *McCarty v. Deeming*, 4 Lans. 440].

<sup>2</sup> 4 K. & J. 257.

<sup>3</sup> *Ripley v. Waterwork*, 7 Ves. 435; *Smith v. Claxton*, 4 Mad. 492.

1-ly. To what extent is the trust for conversion still in force?

2dly. Who is to benefit by the lapse or failure,—the heir or the personal representative of the testator or settlor?

3dly. In what character will the benefit accruing to the testator's or settlor's real or personal representative be taken by such real or personal representative?

I. Under wills.

I. Cases under wills.

Land into money.

(a.) Of land into money.

*Ackroyd v. Smithson*,—the heir takes the undisposed of surplus, or surplus lands.

In *Ackroyd v. Smithson*,<sup>1</sup> a testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds arising out of the sale, and the residue thereof he gave to certain legatees of a previous part of his will in the proportion of the legacies he had already given them. Two of the residuary legatees died during the testator's lifetime; their shares consequently lapsed. The next of kin claimed the lapsed shares as part of the personalty; and so far as they were constituted of personal estate, they were decreed to go to the next of kin of the testator; but so far as they were constituted of real estate, to his heir-at-law. It would, perhaps, be impossible to find a clearer exposition of the principles governing this class of cases than in the celebrated argument of Mr. Scott, afterwards Lord Eldon. "That the heir-at-law is entitled to every interest in land not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not enough that the testator did not intend that his heir should take; he must make a disposition in favor of another.<sup>2</sup> If he has not actually disposed of all his real estate, the law will

There must be a gift over to exclude the heir.

<sup>1</sup> 1 Bro. C. C. 503; 1 Smith L. C. 949.

<sup>2</sup> Fitch v. Weber. p. 164, *post*.



give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and *a fortiori* in a case where he has expressed no intention, to the *hæres natus*. . . . As to the question of fact, whether he meant that in some event only, or that *in all events*, the produce of his real estate should be considered as personality, we admit that in favor of his residuary legatees he meant to convert the whole into personality, in case *all* his residuary legatees should eventually take the whole ; but we contend, that he has intimated no intention as to that part of the produce, as to which his disposition, in the event which has happened, has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property which his residuary legatees were to take ; but as to such part of the property, as in the event, they have not taken, he has not determined upon its nature : he never meant to determine upon its nature, as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or the other must take some part of it ; but to say he has made it all personal property, and that, therefore, the law must give it to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which have not occurred, for the sake of proving a similar intention, where the circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, in order to prove that he intended the same in favor of his next of kin, is to reason from a case in which inten-

Undisposed-of  
proceeds result  
to the heir.

tion is expressed to prove a like intention in a case which supposes the absence of intention.”

Doctrine does not apply to a sale by the court.

It has recently been decided in *Steed v. Preece*,<sup>1</sup> that the doctrine of *Ackroyd v. Smithson* does not extend to the case of a sale under an order of the court in favor of an heir-at-law who had consented to such sale. Lands had been sold to raise an infant's costs in a suit for partition, and it was held that the personal representative was entitled to the surplus as against the remainder-man. Jessel, M. R., there said, that “in *Ackroyd v. Smithson* no such general principle as the following was decided—namely, that if a trustee or the court sell so much land, as it is judged will be required to raise a charge, and there is a surplus, there is an equity to reconvert that surplus in favor of the real representative. The true principle is this, that the moment a sale is *properly* made, conversion follows, and there is no equity to reconvert the surplus.”

*Smith v. Claxton*: The land to be sold results to the heir,—as personal estate, if that is its actual condition.

From the case of *Ackroyd v. Smithson*, the questions, as to what extent the conversion is still in force, and who benefits by the lapse, will find a complete answer; but the further question still remains, whether the land directed to be sold results to the heir as real or as personal property, a question that sometimes arises between the real and personal representatives of such heir. The doctrine on this subject is clearly laid down in the case of *Smith v. Claxton*,<sup>2</sup> a case illustrative of the principles governing equity with reference to cases both of total and of partial failure. “A deviser may give to his devisee either land or the price of land, at his pleasure, and the devisee must receive it in the quality in which it is given, and cannot inter-

<sup>1</sup> 22 W. R. 432; *Foster v. Foster*, 1 Ch. Div. 588; *Mildmay v. Quicke*, 6 Ch. Div. 553; but see *Cooke v. Dealey*, 22 Beav. 196.

<sup>2</sup> 4 Mad. 492.

cept the purpose of the devisor. If it be the purpose of the devisor to give lands to the devisee, the land will descend to his heir; if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of the devisee's personal estate. Under every will when the question is whether the devisee, or the heir, failing the devisee, takes an interest in the land, as land or as money, the true inquiry is, whether the devisor has expressed a purpose that in the events which have happened the land shall be converted into money. (a.) Where sale is necessary,—it results as money to the heir. Where a devisor directs his land to be sold, and the produce to be divided between A. and B., the obvious purpose of the testator is that there shall be a sale for the convenience of division, and A. and B. take their several interests as money and not as land. So if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor that there shall be a sale for the convenience of division, still applies; and the heir will take the share of A., as A. would have taken it, as money and not as land. But suppose A. and B. both to die in the lifetime of the devisor, and the whole interest in the land descends to the heir, the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the quality of money to the interest of the heir. (b.) Where sale is unnecessary, and is not made, or so far as not made,—it results as land to the heir. The obvious purpose of the devisor being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would, therefore, take the whole interest as land." From the course of this argument, and from the current of authorities, the rule would seem to be briefly this, that where it is *necessary* to sell the land for the purposes of the trust, and there is only a *partial* disposition of the produce of the

sale, here the surplus belongs to the heir as money and not as land, and will, therefore, go to his personal representative, even though the land may not have been sold during his lifetime, *provided that it be afterwards actually sold*, and the surplus ascertained.<sup>1</sup>

**Money into land.** (b.) Money directed to be laid out in land.

The principle on which *Ackroyd v. Smithson* was decided applies also to the converse case of money directed to be laid out in the purchase of real estate, devised to uses which partially fail; for the undisposed of interest in the money will result for the benefit of the next of kin of the testator as personality, and will not go to the heir-at-law.<sup>2</sup> Lord Cottenham, while Master of the Rolls, in the case of *Cogan v. Stephens*,<sup>3</sup> after examining all the authorities upon this subject, put an end to the anomaly, which would otherwise have existed in the law of conversion, by deciding in favor of the claims of the next of kin. In *Cogan v. Stephens*, the testator ordered that £30,000 should be laid out immediately by his executors in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which should belong to his widow during her life, and after her decease to certain persons (all of whom died during the life of his widow, without issue) in tail, with remainder to a charity. The money was not laid out, and the gift to the charity being void under the statute of mortmain, it was held that the next of kin and not the heir-at-law of the testator were entitled to the fund. "If

*Cogan v. Stephens*:  
Undisposed of  
money results to  
personal repre-  
sentatives.

<sup>1</sup> Wright v. Wright, 16 Ves. 188; Jessopp v. Watson, 1 My. & K. 665; Wall v. Colishead, 2 De G. & J. 683. [The American cases on this branch of this chapter sustain the rule adopted by the English courts. See Pom. Eq. Jur. § 1171].

<sup>2</sup> Reynolds v. Godlee, Johnson, 536, 582. [Hawley v. James, 5 Paige, 318].

<sup>3</sup> 1 Beav. 482, n.

a testator," said his Lordship, "devises land for purposes altogether illegal, or which altogether fail, the heir-at-law takes it as undisposed of. If a testator gives personal property for purposes altogether illegal, or which altogether fail, the next of kin takes it as in the case of an intestacy, as undisposed of. If a testator devises land for purposes which are in part illegal, or which partially fail, or which require part only of the lands devised, the heir takes so much of the land as is undisposed of, and which was destined for the purpose which by law cannot, or in fact does not, take effect, and so much as is not required for the purposes of the will, and this is whether the land be actually sold or not. But here, it is said, the analogy between the cases of land and money ceases, and that if a testator directs money to be laid out in the purchase of land for purposes which are partly illegal or which partially fail, the next of kin has no such interest in the money as cannot be applied to the purposes of the will; but if there are purposes legal and feasible which require the investment, the next of kin are excluded. And why are they to be so excluded? . . . In deciding in favor of the next of kin, I am following the principle of *Ackroyd v. Smithson*, and maintaining that uniformity of decision as to the conversion of land into money, and of money into land, which was supposed to exist before that time."

So far the analogy between cases of conversion of land into money and of money into land is complete. Here, however, the analogy ceases, or rather apparently ceases, but in reality continues. As to the question—in what character the undisposed-of personalty to be converted into land comes into the hands of the personal representative of the testator, whether, in apparent analogy to the decision in *Smith v. Claxton*, he will take it as realty, or

*Reynolds v. Godlee.*  
Undisposed-of  
personalty re-  
sults to personal  
representatives  
of testator as  
personalty.

whether he will take it in its original character of personalty, the case of *Reynolds v. Godlee*,<sup>1</sup> has decided that the latter is the true view—that personalty directed by will to be laid out in land to be held in trusts, which do not exhaust the absolute interest, devolves, after the expiration of the specified trusts, upon the executors of the testator, as personalty for the next of kin, *that being, of course, its actual condition at the time of its devolution*.<sup>2</sup> And this is in fact what the converse case of *Smith v. Claxton* decided, although it is commonly misunderstood on this precise point. “It is urged,” said Wood, V. C., “that the analogy of *Smith v. Claxton* must be applied completely, as to make this real estate in the hands of the next of kin. But there is a great difference between realty and personalty in this respect. It is not the next of kin at all, but the executors on whom personal property devolves, until the purposes of the will are satisfied. . . . The executor is in general the only person who can stand here to claim the personal estate, and whatever he gets in *qua* executor, he must hold as personalty.”

Blending of real and personal estate,—the principle of *Ackroyd v. Smithson*, is not thereby excluded

It was decided in *Jessopp v. Watson*,<sup>3</sup> that the blending of the proceeds of the real with the personal estate, for an express purpose which fails, will not operate to convert the real into personal estate for a purpose not expressed; viz., to give it to the next of kin. This rule received a strong application in *Fitch v. Weber*.<sup>4</sup> There the testatrix devised and bequeathed her real and personal estate in trust, as to the real estate for sale, as soon after her decease as could be, and declared that the trus-

<sup>1</sup> 1 Johnson, 536, 583.

<sup>2</sup> *Curteis v. Wormald*, 10 Ch. Div. 172.

<sup>3</sup> 1 My. & K. 667.

<sup>4</sup> 6 Hare, 146.

tees should stand possessed of the proceeds of the sale, as a fund of personal and not of real estate, *for which purpose such proceeds, or any part thereof, should not in any case lapse or result for the benefit of the heir-at-law*; and after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects, as she should by any codicil to her will direct or appoint. The testatrix made no codicil. It was held that the heir-at-law was entitled to the proceeds of the real estate undisposed of—that the mere intention to exclude the heir was of no avail, *unless there was a gift over on failure of the purposes, to some one else*—that the purpose for which the testatrix said she excluded the heir, was simply that the realty might be made a fund of personalty, which purpose would not *per se* be sufficient to disinherit the heir *except for the purposes of the will*.

The several cases on the subject seem to depend on this question,—“Whether the testator meant to give the produce of the real estate the quality of personalty to *all intents*, or only so far as respected the particular purposes of the will; for unless the testator has sufficiently declared his intention that the realty shall be converted into personalty, not only for the *purposes of the will*, but further, that the produce of the real estate shall be taken as personalty, *whether such purposes take effect or not*, so much of the real estate or produce thereof as is not effectually disposed of by the will at the time of the testator’s death (whether from the silence or inefficiency of the will itself, or from subsequent lapse or other cause of failure) will result to the heir. But every conversion, however absolute in its terms, will be deemed a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons

Conversion for purposes of will, or out and out.

respectively on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin."<sup>1</sup>

II. Cases under settlements.

II. Cases under settlements or other instruments *inter vivos*.

(a.) Of land into money.

(b.) Of money into land.

Property results to settlor in converted form.

In both these cases, one general rule is applicable. When, by an instrument, *inter vivos*, realty is directed to be converted into personalty,<sup>2</sup> or personalty into realty,<sup>3</sup> for certain specified purposes or objects, and a *part* of those purposes or objects fail, the property to that extent results to the settlor, and through him, if it is land, directed to be converted into money, it goes to his personal representatives,<sup>4</sup> and if it is money directed to be converted into land, it goes to his heir;<sup>5</sup> and its subsequent further devolution (if any) will, *semble*, depend upon its actual character at the time that further devolution arises.

Distinction between partial failure under a will and under a settlement.

It will be seen, therefore, that there is a material distinction as to the application of the doctrine of resulting trusts between those cases where conversion partially fails, when it is directed by will, and when it is directed by deed. In the case of conversion directed by will, if there has been any partial failure of the purposes for which the conversion has been directed, to that extent it will result to the testator's representatives, real or personal, who

<sup>1</sup> Mr. Coxe's note to *Cruse v. Barley*, 3 P. Wms. 22; 1 Jarman on Wills, 530, 2d ed.; *Amphlett v. Parke*, 2 Russ. & My. 221; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Robinson v. Governors of London Hospital*, 10 Hare, 19; *Barrs v. Fewkes*, 13 W. R. 987.

<sup>2</sup> *Clarke v. Franklin*, 4 K. & J. 263.

<sup>3</sup> See *Pulteney v. Darlington*, 1 Bro. Ch. Ca. 223; *Lechmere v. Lechmere*, Ca. temp. Talb. 80.

<sup>4</sup> *Griffith v. Ricketts*, 7 Hare, 299.

<sup>5</sup> *Wheldale v. Partridge*, 8 Ves. 236.



would have been entitled to take it had no conversion been directed, whereas in the case of conversion directed by deed or other instrument *inter vivos*, the rule is just the reverse.<sup>1</sup>

The reason of this distinction, as has already been pointed out, is, that whereas a will comes into operation from the death of the testator, a deed takes effect in the *settlor's* lifetime, from the moment of its delivery. A simple illustration will suffice to set the rules on this subject in the clearest light. Suppose a conveyance of real estate by deed upon trust to pay the rents and profits to the settlor during his life, and after his death to sell the same and divide the proceeds between A. and B. equally, if then living. Afterwards A. dies before the time when his share becomes due, *i. e.*, before the settlor's death. As to his moiety there is a failure. Who takes it? Clearly the settlor, who is still alive, and to whom it must, therefore, result; but in what form? Here steps in the principle, that a deed for the purpose of conversion operates from the moment of its delivery, even though the settlor has directed the sale to take place after his death. The deed, therefore, has converted the realty in the lifetime of the author of the deed. "Whatever be the time at which that conversion is directed to take place, whether in the grantor's lifetime or after his death, the grantor by executing a deed of this description says, in effect, '*From the time I put my hand to this deed, I limit so much of this property to myself as personal property.*'"<sup>2</sup> The property results into the hands of the settlor, not as realty, but in that form into which he has directed it to be converted, *i. e.*, as personalty.<sup>3</sup>

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<sup>1</sup> Brown's Dictionary—title Conversion.

<sup>2</sup> Clarke v. Franklin, 4 K. & J. 233.

<sup>3</sup> Ibid.

## CHAPTER X.

## RECONVERSION.

## Reconversion.

Reconversion may be defined as that notional or imaginary process by which a prior notional conversion is annulled and taken away, and the notionally converted property is restored in contemplation of a court of equity to its original actual unconverted quality. Thus real estate is devised on trust to sell and pay the proceeds to A. ; by virtue of the direction, A. becomes absolutely entitled from the moment of the testator's death to the property as personalty, whether an actual sale has taken place or not. But A. has a right to elect in what form he will take the property. He has a right to tell the trustees, "I prefer the land instead of the purchase-money of the land." And according to his election the property will vest in him, as land or as money.

## Two varieties of reconversion.

The cases on this subject range themselves under two heads. Reconversion may take place in either of two ways—viz., either

- I. By the act of the parties ; or,
- II. By operation of law.

## I. By the act of the parties.

- I. Reconversion by the act of the parties.

(A.) Who may and who may not elect, so as to reconvert,—and to what extent?

1. It is clear that an absolute owner in fee simple <sup>I. By absolute owner.</sup> in possession of property directed to be converted may elect to take that property in whatever form he chooses,—there being, in fact, no other person who has any voice in the matter. And the reason is this, that since “equity, like nature, will do nothing in vain,” if the person in whose favor the conversion is directed elects to have the property in its unconverted state, it will be vain for equity to compel the doing of that which may be undone the next moment. But as the presumption is, that what ought to be done will be done—that conversion will take place—the onus of proof will be on those who allege that the owner has reconverted the property.<sup>1</sup>

2. So far the law is clear when the person entitled <sup>2. By owner of an undivided share.</sup> either to the money to be laid out in land, or to the land to be sold for money, is the absolute and only fee-simple owner in possession. But what is the principle when the person entitled is entitled not to the whole subject-matter, but to an undivided share?

(a.) Of money into land. In *Seeley v. Jago*,<sup>2</sup> <sup>(a.) Of money to be turned into land,—the undivided owner may reconvert.</sup> A. devised £1000 to be laid out in the purchase of lands in fee for the benefit of A., B., and C., *equally to be divided*. A. dies leaving an infant heir, and B. and C., together with the infant heir, bring a bill for the £1000. The Lord Chancellor said: “The money being directed to be laid out in land for A., B., and C., *equally*, which makes them tenants in common, and B. and C., electing to have their two-thirds in money, let it be paid to them, for it is vain to lay out this money in land for B. and C., when the next moment they may turn it into money, and equity, like nature, will do nothing in vain.”

<sup>1</sup> *Sisson v. Giles*, 11 W. R. 971; *Benson v. Benson*, 1 P. Wms. 130.

<sup>2</sup> 1 P. Wms. 389.

(b.) Of land to be converted into money,—the undivided owner may not reconvert.

(b.) Land to be turned into money. In *Holloway v. Radcliffe*,<sup>1</sup> A. B. was entitled to two-thirds of an estate directed to be converted into personalty. *Held*, that it had not been reconverted into realty by acts of A. B., done independently of the person entitled to the remaining one-third. Here the principle is clear. The sale of an undivided share would presumably be less marketable, and produce a far less sum than would be receivable in respect of that share of the proceeds of sale of the entirety; and, therefore, neither of the two undivided owners has a right to compel the other to forego a sale of the whole property.

3. By remainder-man,—to extent of his own interest only.

3. A remainder-man cannot elect so as to affect the interests of the owners of prior estates.<sup>2</sup> Take, for instance, the simple case of a settlement of money to be laid out in land upon trust for a tenant for life, with remainder in fee to some third person. There is no principle either at law or in equity, by which the remainder-man in fee can, as against the tenant for life, elect to take the property as money. The tenant for life can insist on his rights under the settlement, and can compel the trustees of the settlement to lay out the money as directed by the settlement. But although, as against the tenant for life, the remainder-man has no right to say that the money to be laid out in land shall again become money—shall be reconverted—of course, there is nothing to prevent the remainder-man declaring, *as between his real and personal representatives*, who claim as volunteers under him, that a particular reversionary interest to which he is entitled, shall be money or shall be land.<sup>3</sup>

<sup>1</sup> 23 Beav. 163.

<sup>2</sup> [Prentice v. Jannsen, 79 N. Y. 478].

<sup>3</sup> 2 Sp. 271; Triquet v. Thornton, 13 Ves. 345; Gillies v. Longlands, 4 De G. & Sm. 372, 379; Cookson v. Cookson, 12 Cl. & F. 121.

4. An infant cannot ordinarily reconvert;<sup>1</sup> be-  
 cause, usually, the matter can wait till he comes of  
 age. And if the matter won't wait, then the court  
 may direct an inquiry whether it is for the benefit  
 of the infant to reconvert or not, and will order and  
 decree according to the result of the inquiry,—but  
 apparently without prejudice to the diverse rights  
 of the real and personal representatives of the in-  
 fant dying under age.<sup>2</sup>

5. A lunatic cannot reconvert,<sup>3</sup> but his commit-  
 tee, with the sanction of the court, may do so for  
 him, in which case the like inquiry will be directed  
 as in the case of infants; only the court, *semble*,  
 will not in the case of lunatics have any regard to,  
 or make any saving of, the diverse rights of the  
 real and personal representatives of the lunatic.<sup>4</sup>

6. The rules as to the capability of married  
 women to reconvert, demand a more particular con-  
 sideration.

(a.) As to money to be converted into land.

A *feme covert* cannot elect by a contract or ordi-  
 nary deed.<sup>5</sup> But although, as observed by Lord  
 Hardwick in *Oldham v. Hughes*,<sup>6</sup> “a *feme covert*  
 cannot alter the nature of money to be laid out in  
 land, *barely* by a contract or deed, for to alter the  
 property of it, or course of descent, yet the money  
 may be invested in land (and sometimes sham pur-  
 chases have been made for that purpose), and she  
 may then levy a fine of the land and give it to her

(a.) Money into land.

(aa.) Anciently, the married woman was examined in court, and so recon-verted.

<sup>1</sup> Seeley v. Jago, 1 P. W. 389; Carr v. Ellison, 2 Bro. C. C. 56; Dyer v. Dyer, 13 W. R. 732; Robinson v. Robinson, 19 Beav. 494.

<sup>2</sup> See the chapter on Infants, *infra*; also Foster v. Foster, L. R. 1 Ch. Div. 588.

<sup>3</sup> Ashby v. Palmer, 1 Mer. 296.

<sup>4</sup> See the chapter on Lunatics, *infra*.

<sup>5</sup> Frank v. Frank, 3 My. & Cr. 171.

<sup>6</sup> 2 Atk. 453.

husband, or anybody else. There is a way, also, of doing this without laying the money out in land, and that is by coming into this court, whereby the wife may consent to take this money as personal estate; and upon her being present in court, and being examined (as a *feme covert* on a fine is) as to such consent, it binds this money articted to be laid out in land as much as a fine at law would the land, and she may then dispose of it to her husband, or anybody else; and the reason of it is, that at law money so articted to be laid out in land is considered barely as money till an actual investiture, and the equity of this court alone views it in the light of a real estate; and, therefore, this court can act upon its own creature, and do what a fine at common law can upon land, and, if the wife has craved aid of this court, in the manner I have mentioned, she might have changed the nature of this money which is realized; but she cannot do it by deed."

(bb.) At present, the married woman executes a deed acknowledged, and so reconverts.

The necessity of making these sham purchases caused much inconvenience, which was attempted to be remedied by several statutes. Finally, by 3 & 4 Will. IV., c. 74, s. 77, a married woman was permitted by deed executed in compliance with its provisions to make her election to take or dispose of money to be laid out in land.<sup>1</sup>

(b.) Land into money.

(aa.) Anciently, the married woman reconverted by levying a fine.

(b.) Land to be converted into money.

Here the husband and wife might, before the stat. 3 & 4 Will. IV., c. 74, so long as the land remained unsold, by levying a fine, bar all the wife's estates and interest in the money to arise from the sale of the land.<sup>2</sup> Such was the state of the old law; and under the Act for the abolition of fines and recoveries, the result is the same. That Act in

<sup>1</sup> Forbes v. Adams, 9 Sim. 462.

<sup>2</sup> Co. Litt. 121 a. n.; May v. Roper, 4 Sim. 360.

substance, says,<sup>1</sup> that a married woman may, with (bb.) At present, the married woman reconverts by executing a deed acknowledged. her husband's concurrence, by deed acknowledged under the Act, dispose of lands, or of money subject to be invested in lands, and also, of "any interest in land, either at law or equity, or any charge, lien, or encumbrance in, or upon, or affecting land, either at law or in equity." In *Briggs v. Chamberlain*,<sup>2</sup> it was decided that where the personal estate consists of moneys to arise from the sale of lands, she might bind her interest by a deed acknowledged, the subject-matter of disposition being then an interest in land, and falling, therefore, within the words of the statute; and in *Tuer v. Turner*,<sup>3</sup> it was similarly decided regarding a married woman's reversionary interest, or remainder, in like moneys.

[In the United States, a married woman can doubtless elect by means of any instrument sufficient to enable her to convey real estate.<sup>4</sup>]

(B.) Mode in which election to take the property How election is shown. in its actual state may be made.

Of course it is clear that an express declaration (a) By express direction. of intention on the part of the absolute owner of property not being under any disability, that it shall be deemed real or personal estate, is *per se* sufficient to bind those claiming under him, without any reference to the actual estate or condition of the property at the time, though it has been doubted whether a declaration by parol would be sufficient.<sup>5</sup>

But much greater difficulty arises where the (b.) By implied direction, from conduct. owner does not express his intention so to recon-

<sup>1</sup> Sec. 77.

<sup>2</sup> 11 Hare, 69.

<sup>3</sup> *Tuer v. Turner*, 20 Beav. 560.

<sup>4</sup> [Pom. Eq. Jur. § 1176, n.]

<sup>5</sup> *Bradish v. Gee*, Amb. 229; but see *Chaloner v. Butcher*, cited 3 Atk. 685; *Pulteney v. Darlington*, 1 Bro. C. C. 237; *Wheldale v. Partridge*, 8 Ves. 236; 1 Smith L. C. 932.

vert; the question will then occur, what acts of the owner are sufficient to lead to an inference that he desired and intended to possess the property according to its actual state and condition.

(aa.) As to land into money,—slight circumstances suffice to reconvert.

(a.) As to real estate directed to be converted into money, slight circumstances are sufficient to raise a presumption that the owner has elected to retain it as realty. Thus if a person keeps land unsold for a long time, a presumption will arise that he has elected to take it as land.<sup>1</sup> So the circumstances of granting a lease, reserving rent to the party entitled, her heirs, and assigns, was strong evidence of an intention in the lessor to elect that it should continue as land.<sup>2</sup> In *Davies v. Ashford*,<sup>3</sup> by marriage settlement real estates were conveyed to trustees, on trust to sell, and hold the proceeds on trusts for the husband and wife, for their lives successively, remainder on trust for their children, remainder on trust for the survivor of husband and wife absolutely. There was no issue. The husband survived his wife, and after her death consulted his solicitor as to his rights under the settlement, and then got possession of the settlement and title-deeds, &c., and remained in possession of them until his death, and also of the estates. *Held*, that he had elected to take the estates as land. The V. C. of England said, “It does not distinctly appear in whose custody the title-deeds originally were, but it is clear that there was a change in the possession of them, and that Mr. Davies got them into his custody. Now, was not that of necessity a de-

<sup>1</sup> *Dixon v. Gayfere*, 17 Beav. 433; *Griesbach v. Fremantle*, 17 Beav. 314; *Kirkman v. Miles*, 13 Ves. 338; *Mutlow v. Bigg*, L. R. 1 Ch. Div. 385; *In re Gordon*, *Roberts v. Gordon*, L. R. 6 Ch. Div. 531.

<sup>2</sup> *Crabtree v. Bramble*, 3 Atk. 680.

<sup>3</sup> 15 Sim. 42.



struction of the trust? For the trustees could not have compelled Mr. Davies to deliver up the deeds; and without doing so they could not have made an effectual sale of the estate.”

(b.) As regards personal estate to be laid out in land, of course, if the person absolutely entitled receives the money from the trustees, he is held to have elected to take it as money, and the trust is at an end.<sup>1</sup> But it will not be so deemed where he has received merely the *income*, though for a long time.<sup>2</sup>

(bb.) As to money into land,—slight circumstances not sufficient to reconvert.

## II. Reconversion by operation of law.

II. By operation of law.

If an instrument is to be taken to impress a fund with real qualities, the money being once clearly impressed with real uses, as land, in a contest between the heir and executor, the impression will remain for the benefit of the heir; and to put an end to that impression two things are necessary, neither of which standing alone will suffice, to reconvert the property, that is to say, firstly, it must be shown that the money was in the hands, *i. e.*, in the actual possession, of a person who had in himself both the executors and the heirs;<sup>3</sup> and, secondly, that person must have died without making any declaration of his intention regarding it. If both these two things combine, then the property shall go according to the quality in which it was left by him at his death. And these two things being proved, the onus of proof to the contrary lies, of course, on those who deny reconversion, whereas in the case of reconversion by the act of the parties, it was pointed out that the onus lies on those who allege reconversion.

Concurrence of two requisites to reconversion necessary,—1st, property in person entitled whether it be real or personal, and 2d, no declaration by him concerning it.

<sup>1</sup> *Trafford v. Boehm*, 3 Atk. 440; *Rook v. Worth*, 1 Ves. Sr. 461; *Cookson v. Cookson*, 12 Cl. & F. 147; *In re Davidson*, *Martin v. Trimmer*, 11 Ch. Div. 341.

<sup>2</sup> *Gillies v. Longlands*, 4 De G. & Sm. 372; *Re Pedder's Settlement*, 5 De G. M. & G. 890.

<sup>3</sup> *Wheldale v. Partridge*, 8 Ves. 235.

*Chichester v. Bickerstaff*—the money was “at home” for three days only, and Sir John “died and made no sign” about it.

In *Chichester v. Bickerstaff*,<sup>1</sup> on the marriage of Sir John Chichester with the daughter of Sir Charles Bickerstaff, Sir Charles by articles covenanted to pay £1500 in part of the portion, which, together with £1500 to be advanced by Sir John within three years after the marriage, was to be invested in land and settled on Sir John for life, remainder to his intended wife for life, remainder to their issue, remainder to Sir John’s right heirs. Within a year of the marriage the wife died childless, and Sir John *three days after his wife*. Sir John by his will made Sir Charles his *executor*, and devised the residue of his personalty, after debts, &c., paid to Frances Chichester, his sister. The heir-at-law of Sir John filed a bill against Sir Charles to compel him to pay the £1500 which Sir John had covenanted to pay, insisting that by virtue of the marriage articles the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir. But Lord Somers said, “This money, though once bound by the articles, yet, when the wife died without issue, became free again, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and the case is much stronger where there is a residuary legatee,” and therefore dismissed the bill.

*Pulteney v. Darlington*,—the money was doubly reconverted, having been twice over “at home.”

In the case of *Pulteney v. Darlington*,<sup>2</sup> money impressed with the qualities of realty had come by operation of law into the hands of the person (Lord Bath) solely entitled to it under the limitation in fee; and the person so entitled, without taking notice of the particular sum, devised all his manors,

<sup>1</sup> 2 Vern. 295.

<sup>2</sup> 1 Bro. C. C. 223.

&c., which he was seized or possessed of, or to which he was in any wise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust-moneys (except certain *locally* described estates therein mentioned) to his brother H. in fee, and gave him all the residue of his personal estate, and made him his executor. His brother H. subsequently, by his will, gave all his estates by *local* descriptions to certain uses therein mentioned, and all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, for certain trusts mentioned in his will. Subsequently to H.'s death, a bill was brought by the heir-at-law of Lord Bath to have the money laid out in land, but was dismissed. "If," said Lord Thurlow, "A. B. has in his possession £20,000 to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one thing person, the action is extinguished;" and after citing and commenting upon the cases on the subject, his Lordship added, "The use I make of these cases, notwithstanding the dicta they contain, is this, that where a sum of money is in the hands of one without any other use but for himself, it will be money, and the heir cannot claim.

Money impressed with real uses *at home* in the hands of the absolute owner descends as money.

. . . But whether this is clearly so or not, circumstances of demeanor in the person (even though slight) will be sufficient to decide it; a very little would do; receiving it from the trustees, there is no doubt, would be sufficient. *Lord Bath did receive it, he had it in his hands.*" This decision was affirmed in the House of Lords;<sup>1</sup> and as Lord Eldon says, "went no further than this, that if the property was *at home*, in the possession of the person under whom the heir and executor claimed, the heir

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<sup>1</sup> 7 Bro. P. C. Toml. Ed. 530.

But not if it be  
outstanding in  
hands of a third  
party.

could not take it, but if it stood out in a third person he possibly might; and the question in that case was not upon the equity between the heir and executor, but whether the money was at home.<sup>1</sup>

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<sup>1</sup> Wheldale v. Partridge, 8 Ves. 235. And see Walrond v. Rosslyn, Walrond v. Fulford, 11 Ch. Div. 640.

## CHAPTER XI.

### ELECTION.

The doctrine of election in equity originates in two inconsistent alternative donations or benefits, the one of which the pretending donor has no power to make, without at least the assent of the donee of the other benefit. In this duality of gifts, or pretended gifts, there is an intention, which may be express but which is more often implied, that the one gift shall be a substitute for the other, and shall take effect only if the donee thereof permits the other gift to also take effect, substantially in the manner and to the extent intended by the donor. The permitting donee has the right to choose; whence this head of equity is commonly called election.

Election arises from inconsistent alternative gifts.

If the individual, to whom, by an instrument of donation, a benefit is offered, possesses a previous claim on the author of the instrument, and an intention appears that he shall not receive the benefit and also enforce his claim, the like principle of executing the purpose of the donor, requires the donee to elect between his original right and the substituted benefit: the gift being designed as a satisfaction of the claim, he cannot accept the former with-

Illustrations of inconsistent alternative gifts or quasi-gifts.

out renouncing the latter.<sup>1</sup> But the commonest application of the doctrine is where the owner of an estate, having, in an instrument of donation, applied to the property of another, expressions which, were that property his own, would amount to an effectual disposition of it to a third person, has also by the same instrument disposed of a portion of his (the donor's) own estate in favor of the proprietor whose rights he assumes to interfere with. In such a case the donor is understood to impose on the proprietor in question,—either the obligation of relinquishing the benefit conferred on him by the instrument, if he asserts his own inconsistent proprietary rights (to the extent at least of the fair market value of the proprietary interests which he so asserts); or, if he accepts that benefit, then the obligation of completing the donor's intended disposition by the conveyance, in conformity to it, of that portion of his property which it purports to affect.<sup>2</sup>

The *foundation* and the *characteristic effect* of the equitable doctrine.

The *foundation* of the doctrine is the intention of the author of the instrument; an intention which, extending to the whole disposition, is frustrated by the failure of any part; and its *characteristic*, in its application to these cases, is, that, by an equitable arrangement, effect is given to a donation of that which is not the property of the donor; a valid gift in terms absolute, being qualified by reference to a distinct clause, which, though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition; whether express or implied, and although destitute of legal validity, annexed to the benefit proposed to him. To accept the benefit while he declines the burden is to frus-

<sup>1</sup> See post on the Doctrine of Satisfaction.

<sup>2</sup> [Wilbanks v. Wilbanks, 18 Ill. 17].

trate the intention of the donor.<sup>1</sup> To illustrate this application of the doctrine of election, suppose A. by *will* or *deed* gives to B. property belonging to C., and by the *same* instrument gives other property belonging to himself to C., a court of equity will hold C. to be entitled to the gift made to him by A., only upon the implied condition of his conforming with all the provisions of the instrument, by renouncing the right to his own property in favor of B. : he must consequently make his choice, or, as it is technically termed, he is put to his election, to take either under or against the instrument.

The doctrine of election, in common with many other doctrines of our courts of equity, appears to be derived from the civil law, or at all events to be not without its analogy in that law. For, in Roman law, a bequest of property which the testator knew to belong to another was not void ; but a bequest on the erroneous supposition that the subject belonged to the testator, was, it seems, invalid.<sup>2</sup> In the latter respect, the Roman law is different from the English law, for by the English law (which dislikes those fruitless and impossible inquiries with which the civil law abounded), whether the donor knew or not that the property he assumed to deal with was his own or not, if he has advisedly assumed to give it, then and in either case it is held that the donee is put to his election.<sup>3</sup>

In the case already put, of A. giving to B. property belonging to C., and by the same instrument giving to C. other property belonging to A. himself, C. has two courses open to him to choose or to elect between,—

Either, 1stly, He may elect to take under the instrument, and consequently to conform to all its

Election,—derived from the civil law.

Two courses open to elect between,

(1.) Election under instrument.

<sup>1</sup> Note to *Dillon v. Parker*, 1 Sw. 395.

<sup>2</sup> See *Just's Insts.* ii. 24, I.

<sup>3</sup> *Whistler v. Webster*, 2 Ves. Jr. 370.

provisions. Here no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by A.

(2.) Election against the instrument.

Or, 2dly, He may elect against the instrument, in which case the question arises,—Does C., by refusing to conform to the terms of the instrument, wholly forfeit his claim to the benefit intended to be conferred on him by that instrument, or does he forfeit only so much of that benefit under the instrument, as is necessary to compensate B. for the disappointment he has suffered by C.'s election against the instrument?

Illustration,—showing that compensation and not forfeiture is the rule,—upon an election against the instrument.

To illustrate, by a simple case. Suppose A., the testator, gives to B. a family estate belonging to C., worth £20,000 in the market, and by the same will gives to C. a legacy of £30,000 of his (A's.) own property. C. is unwilling to part with his family estate, and, therefore, elects against the instrument. It has been held, that, in such a case, viz., the election against the instrument, the principle of compensation, and not that of forfeiture, is to govern. In the case put, therefore, C. will retain his family estate and will also receive £10,000 portion of his legacy of £30,000, leaving to B. £20,000 other portion of the legacy of £30,000 to compensate him for the value of the estate of which he has been disappointed by C.'s election against the instrument. The conclusion from all the cases is summed up by Mr. Swanston in his note to *Gretton v. Haward*,<sup>1</sup> as follows:

1st. That in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefits intended for the refractory donee, in order to secure *compensation* to those whom his election disappoints.

<sup>1</sup> 1 Swanst. 433; see also *Rogers v. Jones*, L. R. 3 Ch. Div. 688; *Pickersill v. Rodger*, L. R. 5 Ch. Div. 163.



2d. That the surplus, after compensation, does not devolve, as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right.

It may be useful to warn the student carefully to discriminate this class of cases where a person disposes of that which is *not his own*, and confers on the real owner of that property some other benefits, from another apparently similar but in reality dissimilar class of cases, where a testator makes two or more separate devises or bequests of *his own* property in the same instrument. In this latter case, the gifts, whether beneficial or onerous, being both of them the property of the donor, the donee may take what is beneficial and reject what is onerous, unless it appear on the will that it was the intention of the testator to make the acceptance of the burden a condition of the benefit;<sup>1</sup> but this class of cases does not fall properly within the equitable doctrine of election, and the student should accordingly wholly dismiss it from his mind.

As the doctrine of election depends on the principle of compensation, it follows that that doctrine will not be applicable where there is no fund from which compensation can be made. Or, speaking more accurately and plainly, the doctrine of election only properly arises where the donor, or pretending donor, really puts into his gifts, or pretended gifts, or some or one of them, *some property that actually is his own*, at the same time that he affects to give away the property of others. This will come out clearly upon contrasting the two next following cases:

Firstly, in the case of *Bristow v. Warde*,<sup>2</sup> decided in 1794, it appeared that a father had the

No election proper, in cases where the testator makes two bequests of his own property in the same instrument.

There must be a fund from which compensation can be made, i. e., some property of donor's own.

*Bristow v. Warde*,—case of donor not adding any property of his own.

<sup>1</sup> Warren v. Rudall, 1 J. & H. 13.

<sup>2</sup> 2 Ves. Jr. 336. See also *In re Fowler's Trust*, 27 Bea v. 362.

power of appointing certain moneys or stock (£6000 South Sea stock) among his children, and that the appointment-funds in question were given to the children in default of appointment by the father; it also appeared that the father by his will appointed portion of the funds to his children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees); and it also appeared that the father did not in or by his will give any property of his own to the children. The court held that the children might keep their appointed shares, and also take (as in default of appointment) the shares appointed to X., Y., and Z.; and that, in fact, the children were not bound to elect. "The doctrine of election," said the Lord Chancellor, "never can be applied; but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore, in all cases, there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that which he had power to distribute." On the other hand, in the case of *Whistler v. Webster*,<sup>1</sup> also decided in 1794, it appeared that a father had the power of appointing certain moneys (£3000) among his children, and that the appointment-funds in question were given to his children in default of appointment by the father; it also appeared that the father by his will appointed portion of the funds to his children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees); but it also appeared that the father in and by his will

*Whistler v. Webster*,—case of donor adding some property of his own.

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<sup>1</sup> 2 Ves. Jr. 367. [Wilbanks v. Wilbanks, 18 Ill. 17.]

gave also certain property of his own to the children. The court held that the children were bound to elect, keeping (if they chose) their appointed shares and the other benefits given to them in the will, and in that case not interfering with the shares improperly appointed to X., Y., and Z.; or else taking (if they chose) the entire appointment-fund to themselves, and out of the other benefits given to them by the will compensating X., Y., and Z. for the value of the shares improperly appointed.

Considerable difficulty often attaches to cases of election when complicated, as the two lastly before stated cases were, with special powers of appointment, and it becomes necessary, therefore, to consider with some particularity of detail the following group of election cases, that is to say,—

*Cases of election under the execution of powers.* Election under powers.

(a.) Where, under a special power, an express appointment is made to a stranger to the power, (1.) As to person entitled in default of appointment, —a true case of election. which is, therefore, void, and a benefit is conferred by the same instrument, upon a person entitled, in default of appointment, the latter will be put to his election. Thus, “where a man having a power to appoint to A. a fund which, in default of appointment, is given to B., exercises the power in favor of C., and gives other benefits to B., although the execution is merely void, yet if B. will accept the gifts to him, he must convey the estate to C., according to the appointment.”

It has been said that where the donee of a power (2.) As to person entitled under the power,—no case of election properly so called by the same instrument appoints to a stranger, and confers benefits out of his own property upon an object of the power, the latter will be put to his election.<sup>1</sup> But it is submitted that in such a case the person who is the object of the power (not being also the person entitled in default of appoint-

<sup>1</sup> Blacket v. Lamb, 14 Beav. 482; 1 Smith's L. C. 389.

ment) cannot with propriety be said to be put to his election, and for the following reasons. In order to raise a case of election, two essential circumstances, as we have seen, must concur:—

1st. That property which belongs to one person (A.) must be given to another person by the testator.

2d. That the testator at the same time gives to A. property of his (the testator's) own.

In such a case of concurrence, and only in such a case, A. would be put to his election.

Suppose, then, that A. is the object of the power, B. the person entitled in default of appointment to A., and X. is the person in whose favor the appointment is actually made. The appointment in favor of X. is clearly a bad appointment, and, therefore, the property would pass to B. as in default of appointment, and if the testator has conferred any benefits on B., he (B.) will be put to his election. But no property which *belongs to* A. has been given to X.; for A. is but a volunteer as regards the donee of the power, and until the donee has exercised his power over the fund in favor of A., it is not A's. property; therefore, it is clear that an essential element to raise election as against A., is wanting. None of A's. property has been given to another. But if A. had combined in himself both the character of the object of the power, and the person entitled to the fund in default (*i. e.*, if in the case put, A. and B. were the same individual), he would, if he had received any benefits from the donee of the power, be put to his election, not as A., the object of the power, but as *the person* (B.) *entitled, in default of appointment.*<sup>1</sup>

But the same  
thing in effect.

The student will, however, observe that in the case supposed of A. and B. being different persons,

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<sup>1</sup> Whistler v. Webster, 2 Ves. Jr. 367.

if A. gets any portion of the appointment-fund by any appointment thereof to him, he will be simply thankful for it and say nothing about what is appointed to X. ; and if in addition A. gets also some property of the testator's own, he will simply be more thankful (in fact, A. will be doubly thankful), and again will say nothing about what is appointed to X. And that is all the author means by saying that A. will not be put to his election.

(b.) It has been decided "that where there is an absolute appointment by will in favor of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed, in a manner which the law will not allow (*e. g.*, being attempts to evade the rule against perpetuities),<sup>1</sup> the court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes ;" *i. e.*, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election.<sup>2</sup> *On the other hand*, if the attempted modifications are in themselves such as the law will in ordinary cases allow, and are also sufficiently clear and imperative, amounting in substance to the creation of a trust or to a direct gift, then the question of election would arise, and would have to be answered upon the principles already explained. In other words, to cite the words of the Master of the Rolls in *Blacket v. Lamb*,<sup>3</sup> "The question resolves itself into this, whether these words (meaning the precatory words in which it was attempted to modify the interests appointed to the children) amount

*Blacket v. Lamb*,—absolute appointment, with directions modifying the appointment, —when such directions are invalid.

When such directions are valid, and raise a case of election.

<sup>1</sup> Wollaston v. King, L. R. 8 Eq. 165.

<sup>2</sup> Woolridge v. Woolridge, Johns. 63.

<sup>3</sup> 14 Beav. 482. And see the judgment of James, V. C., in Wollaston v. King, L. R. 8 Eq. 165.

to a direct appointment in favor of the grandchildren. If they do amount to such an appointment, there is not, I think, any doubt but that a case of election is raised. But if, on the other hand, these precatory words are to be treated as anything short of an actual appointment, that is, if they do not form a portion of the appointment executed by the testator, in that case they must be treated as a condition or something extraneous to the appointment superadded to it; and if so, and if the superadded condition be inconsistent with the power, it is merely void, and no case of election will arise. I am of opinion, that if the words had been used by the testator with reference to a fund which was wholly within his own control, to deal with *as he might think fit*, these words would have created a trust, and that his children, taking the gifts under the will of the testator, would have taken them charged with the duty of disposing of them according to that will; or, in other words, that a trust would have been created by implication in favor of the objects mentioned in the words of the gift, the execution of which this court would have enforced."

It would seem, accordingly, that where there is a clause of forfeiture of the legacies on non-compliance with any such attempted modification of the appointed interests, a case of election would be raised,<sup>1</sup> assuming that the other conditions requisite for raising a case of election are present.

Ineffectual attempts to dispose of property by will,—examples of raising or not election,—

(a.) Infancy.

Questions of election have also arisen, where a testator has attempted to dispose of his property by an instrument ineffectual for that purpose.

(a.) Infancy.—No case of election will be raised where there is a want of capacity to devise real

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<sup>1</sup> King v. King, 15 Ir. Ch. R. 479; Boughton v. Boughton, 2 Ves. Sr. 12.

estate by reason of infancy. Thus, under the old law, where an infant whose will was valid as to personalty, but invalid as to realty, gave a legacy to his heir-at-law, and devised real estate to another person, the heir-at-law would not have been obliged to elect between the legacy and the real estate, which descended to him in consequence of the invalidity of the devise: he might have taken both;<sup>1</sup> that is to say, he might have kept the real estate coming to him by descent in spite of the will, and also have taken the personal estate coming to him under the will.

(*b.*) Coverture.—Nor will a case of election arise if there is a want of capacity to make a will arising from coverture. Thus, where a *feme covert* made a valid appointment by will to her husband, under a power, and also bequeathed to another person personal estate, to which the power did not extend, the husband was not put to his election, but was held to be entitled to the benefit appointed to him under the power, and also to the property ineffectually bequeathed by his wife, to which he was entitled *jure mariti*.<sup>2</sup> And the rule is the same where the will is valid at the time of execution, but afterwards becomes inoperative.<sup>3</sup>

Coverture.

[Neither of these cases (*a* and *b*) could readily occur at present; since an infant has the same power by statute in most States to make a will of real and personal estate; and a married woman is generally empowered to make a will of all her own property, real or personal].<sup>4</sup>

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<sup>1</sup> *Hearle v. Greenbank*, 3 Atk. 695, 1 Ves. Sr. 298. [*Jones v. Jones*, 8 Gill. 197; *Tongue v. Nutwell*, 17 Md. 212].

<sup>2</sup> *Rich v. Cockell*, 9 Ves. 369. [*Kearney v. Macomb*, 1 C. E. Green, 189.]

<sup>3</sup> *Blaiklock v. Grindle*, L. R. 7 Eq. 215.

[<sup>4</sup> *Pom. Eq. Jur.* § 482].

(c.) Wills before 1  
Vict., c. 26.

(c.) Previous to [modern statutes] where a testator, by a will *not properly attested* for the devise of freeholds, but sufficient to pass personal estate, devised freehold estates away from the heir, and gave him a legacy, the question has arisen whether the heir-at-law was obliged to elect between the legacy and the freehold estate, which descended to him in consequence of the devise away from him being inoperative; it is clearly settled that he would not be obliged to elect,<sup>1</sup> unless the legacy were given to him with an express condition that if he disputed, or did not comply with the whole of the will, he should forfeit all benefit under it.<sup>2</sup> [The rule is now obsolete; as both in England and the United States the same modes of execution are prescribed by statute for wills of real and personal property].

Election with reference to dower,  
—(a.) At law,—  
express words.  
(b.) In equity,—  
express words or  
necessary implication.

A widow may at law be put to her election by express words between her dower and a gift conferred on her.<sup>3</sup> In equity she may be put to her election between dower and a gift conferred on her, by manifest (*i. e.*, necessary) implication, demonstrating the intention of the donor to exclude her from her legal right to dower; but this intention will not be implied unless the instrument contains provisions essentially inconsistent with the assertion of her right to dower.<sup>4</sup> The question then arises, What is a gift essentially inconsistent with her assertion of that right? It has been long settled that a devise, by a testator to his widow, of *part* of the lands of which she is dowable, is not essentially inconsistent with her claim to dower out of the re-

Necessary implication from concurrence of gift to widow with gift of other lands inconsistent with her right of dower.

<sup>1</sup> *Sheddon v. Goodrich*, 8 Ves. 481. [*Melchor v. Becerger*, 1 Dev. & B. (Eq.) 634].

<sup>2</sup> *Boughton v. Boughton*, 2 Ves. Sr. 121. [*Snellgrove v. Snellgrove*, 4 Dessau, 274].

<sup>3</sup> *Nottley v. Palmer*, 2 Drew. 93.

[<sup>4</sup> *Adsit v. Adsit*, 2 Johns, 448.]



mainder.<sup>1</sup> A devise of lands out of which the widow is dowerable on *trust for sale*, is not essentially inconsistent with her claim to dower out of those lands, even though the interest of a part of the proceeds of the sale is given to her;<sup>2</sup> nor will a mere gift of an annuity to the testator's widow, although charged on all the testator's property, be so essentially inconsistent with, as to exclude, her right to dower.<sup>3</sup>

The provisions which have generally been held to be essentially inconsistent with the widow's right to dower, are those which prescribe to the devisees a certain mode of enjoyment, which necessitates their having the entirety of the property. Thus, in *Butcher v. Kemp*,<sup>4</sup> where the testator, having devised a freehold farm, containing about 136 acres, to trustees and their heirs, during the minority of his daughter, directed them *to carry on the business of the farm, or let it on lease, during the daughter's minority*, and the testator devised other lands to his widow for her life, and also gave her specific and pecuniary legacies, it was held that the widow was put to her election. Sir John Leach, V. C., said, "The testator's plain intention is that the trustees should, for the benefit of his daughter, have authority to continue his business in the *entire* farm which he himself occupied, consisting of about 136 acres, and this intention must be disappointed if the widow could have assigned to her a third part of this land."<sup>5</sup>

Example of a gift inconsistent with widow's right of dower.

<sup>1</sup> *Lawrence v. Lawrence*, 2 Vern. 365. [*Lefevre v. Lefevre*, 59 N. Y. 435.]

<sup>2</sup> *Ellis v. Lewis*, 3 Hare, 310. [*Bull v. Church*, 5 Hill, 207].

<sup>3</sup> *Holdich v. Holdich*, 2 Y. & C. 19. [*Hatch v. Hatch*, 52 N. Y. 359].

<sup>4</sup> 5 Mad. 61.

<sup>5</sup> *Miall v. Brain*, 4 Mad. 119; *Birmingham v. Kirwan*, 2 Sch. & L. 444.

*N. B.*—It is hardly necessary to mention, that dower under the recent Dower Act (when that Act applies) is of too fragile and defeasible a character to raise any questions about election.

[The time and mode of electing between her dower and a will by a widow is very precisely regulated in many of the States by statute. In some of them, the common law dower has been abolished, and a statutory right to a portion of the husband's estate substituted. As a result of this legislation, the common law rule has been changed, and unless the husband's intention that she shall receive both the gift and the dower affirmatively appear from the instrument, she is required to elect. In most of these States, this is the rule both as to real and personal property; in others, only as to the latter kind.<sup>1</sup>]

The intention of the testator is to be sought for.

And speaking, generally, in all cases whatsoever, in order to raise a case of election, there must appear on the will or instrument itself, a clear intention on the part of the testator to dispose of that which is not his own, although (as we have seen) it is immaterial whether he knew the property not to be his own, or by mistake conceived it to be his own; if the intention in either case appears clearly, his disposition will be sufficient to raise a case of election,<sup>2</sup> there being present, of course, the other requisites as above defined. On the other hand, if the intention does not clearly appear on the face of the will, but the words appearing to show the intention are capable of being otherwise satisfied, then there will arise no case for election.

Where the testator has a limited interest, he is presumed to have

Accordingly where the testator devises an estate in which he has a limited interest at law, the court

<sup>1</sup> [See Pom. Eq. § 494, and note for an abstract of the statutes on this subject].

<sup>2</sup> *Stephens v. Stephens*, 1 De G. & J. 62; *Welby v. Welby*, 2 V. & B. 199.

will lean, as far as possible, to a construction which would make him deal only with that to which he is entitled, and not with that over which he has no disposing power, inasmuch as every testator must, *prima facie*, be taken to "have intended to dispose only of what he had power to dispose of; and, in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose of."<sup>1</sup>

Thus, in *Shuttleworth v. Greaves*,<sup>2</sup> the wife of F. S. was the only child of A., who was entitled to certain shares in the Nottingham Canal, which upon A's. death were transferred into the names of "F. S. and wife," the wife having been her father's administratrix. F. S. was afterwards, until his death, treated by the canal company as proprietor of the shares, and received the dividends upon them, and was elected to be and also acted as a member of a committee, which, by the Company's Act of Parliament, was required to consist of proprietors of two or more shares. F. S. by his will bequeathed what he called "all my shares in the Nottingham Canal Navigation," and all his personal estate to trustees, in trust for his wife for life, remainder over to his brothers and sisters absolutely. The testator had no such canal shares at all, unless those so transferred into the names of his wife and himself should be considered his. *Held*, that the words of the will amounted to a bequest of the particular shares before mentioned, and that the widow was bound to elect.

On the other hand, in *Dummer v. Pitcher*,<sup>3</sup> by the testator's will "he bequeathed the rents of his

given his own, and not to have attempted to give what was not his own.

*Shuttleworth v. Greaves*,—a case of shares in a specified company.

*Dummer v. Pitcher*—a case of funded property generally.

<sup>1</sup> *Wintour v. Clifton*, 8 De G. M. & G. 651.

<sup>2</sup> 4 My. & Cr. 35.

<sup>3</sup> 2 My. & K. 262.

leasehold houses, and the interest of all his funded property or estate," upon trust for his wife, for life, and after her decease, on trust, to pay divers legacies of stock. The testator had, in fact, no funded property at the date of his will; but there was at that date funded property standing in the joint names of himself and his wife. After his death, the wife claimed, by survivorship, the funded property standing in the names of her husband and herself—it was contended that, as she took benefits under the will, she ought to be put to her election between those benefits and the funded property. It was held, however, that the widow ought not to be put to her election—that she took the stock by survivorship, and that the testator *not having expressed on the face of the will any intention to treat the stock in question as his own*, no question of election arose.<sup>1</sup>

Evidence<sup>1</sup> dehors the instrument,—not admissible to make out a case of election.

It is now clearly settled that parol evidence dehors the will, is not admissible for the purpose of showing that a testator, considering property to be his own, which did not actually belong to him, intended to comprise it in a general devise or bequest. Thus, in *Clementson v. Gandy*,<sup>2</sup> where parol evidence was tendered for the purpose of showing that the testatrix intended to pass, under a general bequest, certain property in which she had only a life interest, supposing it to be her own absolutely, so as to put a legatee who had an interest in the property to his election, Lord Langdale refused to admit the evidence. "I am of opinion," observed his Lordship, "that this evidence cannot be admitted. It is tendered for the purpose of showing that the testatrix bequeathed property as her own which did not belong to her, and that she intended to leave a con-

<sup>1</sup> See *Usticke v. Peters*, 4 K. & J. 437.

<sup>2</sup> 1 Keen, 309.

siderable residue for charitable purposes, which, by reason of that mistake, turns out to be much less than she is alleged to have intended; and it is argued that this raises a case of election. *The intention to dispose must, in all cases, appear by the will alone.* In cases which require it, the court may look at external circumstances, and consequently receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to, except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood.”<sup>1</sup>

(a.) Married women.—Although the practice as to the mode of election by married women has been somewhat fluctuating, an inquiry having occasionally been directed as to which interest was most beneficial for them, and they were then required to elect within a limited time after the result of the inquiry;<sup>2</sup>—it is now considered a settled thing that a married woman can elect so as to affect her interest in [both] real [and personal] property.<sup>3</sup>

Persons under disabilities.  
(1.) Married women,—may elect.

(b.) Infants.—With reference to infants also, the practice is not quite uniform, being of course adapted to the necessities of the case. Thus, in *Streatfield v. Streatfield*,<sup>4</sup> the period of election was deferred until the infant came of age: but in other cases there has been a reference to inquire what would be most beneficial to the infant,<sup>5</sup> and the

(2.) Infants,—they wait till of age; or else elect by direction of court on inquiry.

<sup>1</sup> Stratton v. Best, 1 Ves. Jr. 285; Smith v. Lyne, 2 Y. & C. C. C. 345; Honywood v. Forster, 30 Beav. 14.

<sup>2</sup> Davis v. Page, 9 Ves. 350; Wilson v. Townshend, 2 Ves. Jr. 693.

[<sup>3</sup> Robinson v. Buck, 71 Pa. St. 386.]

<sup>4</sup> 1 Smith L. C. 369.

<sup>5</sup> Bigland v. Huddleston, 3 Bro. C. C. 285, n.; Ashburnham v. Ashburnham, 13 Jur. III. [See McQueen v. McQueen, 2 Jones Eq. 16.]

court has elected upon the result of the inquiry being certified.

(3.) Lunatics,—they elect by direction of court on equity.

(c.) Lunatics.—With reference to lunatics, the [court will make the election on his behalf, after having ascertained through an inquiry what is for his advantage.<sup>1]</sup>

Privileges of persons compelled to elect.

Persons compelled to elect are entitled previously to ascertain the relative value of their own property and that conferred upon them,<sup>2</sup> and may file a bill to have all necessary accounts taken and inquiries made.<sup>3</sup> [But the statutes of some of the States require the election to be made in a certain time. Here this requirement must be followed, or the party will be presumed to have elected or to have refused to elect as the case may be.] An election made under a mistake of fact will not be binding, for in all cases of election, the court, while it enforces the rule of equity that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts, performed, perhaps, in ignorance or under a misapprehension of the value of the funds.<sup>4</sup>

What is deemed an election.

Election may be either *express*, in which case no question can arise; or it may be *implied*. And in the latter case, considerable difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election; and this question must be determined (like any other question of fact) upon the circumstances of each particular case, and not on any general principle of law. It would be necessary to inquire into the circumstances of the

[<sup>1</sup> Kennerly v. Johnson, 65 Pa. St. 451.]

<sup>2</sup> Boynton v. Boynton, 1 Bro. C. C. 445. [Kreiser's Appeal, 69 Pa. St. 194.]

<sup>3</sup> Buttrick v. Brodhurst, 3 Bro. C. C. 88.

<sup>4</sup> Wake v. Wake, 3 Bro. C. C. 255; Kidney v. Coussmaker, 12 Ves. 136; [Shelgrove v. Shelgrove, 4 Dessau. Eq. 27.]

property against which the election is supposed to have been made, for if a party, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take one and reject the other; and in like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own, as, for instance, by mortgaging it (particularly if this be done with the concurrence of the party entitled to call for an election), such dealing will be unavailable to prove an actual election as against the receipt of the rent of the other property.<sup>1</sup> Any acts to be binding upon a person must be done with the intention of electing.<sup>2</sup> [When a widow is requested to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it if done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an election by her to take under the will and to reject her dower.<sup>3</sup>]

It is difficult to lay down any rule as to what length of time [in the absence of statutes], after acts done from which election is usually implied, will be binding on a party, and prevent him from setting up the plea of ignorance of his rights.<sup>4</sup> But, on the other hand, it must be remembered that a person may by his conduct suffer specific enjoy-

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<sup>1</sup> Padbury v. Clark, 2 Mac. & G. 298.

<sup>2</sup> Stratford v. Powell, 1 Ball. & B. 1.; Dillon v. Parker, 1 Swanst. 30, 387.

[<sup>3</sup> O'Driscoll v. Koger, 2 Dessau. (Eq.) 295, Pom. Eq. Jur. § 515, note.]

<sup>4</sup> Reynard v. Spence, 4 Beav. 103; Sopwith v. Maughan, 30 Beav. 235.

Length of time  
raises presump-  
tion.

ment by others until it becomes inequitable to disturb the rights that have meanwhile arisen.<sup>1</sup>

A person who does not elect within the time limited, when a time is limited, will be considered as having elected to take against the instrument putting him to his election, *Semble*.<sup>2</sup>

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<sup>1</sup> *Tibbits v. Tibbits*, 19 Ves. 663. [The statutory provisions as to time of election will be found in Pom. Eq. Jur. § 513, *note*.]

<sup>2</sup> Decree in *Streatfield v. Streatfield*, 1 Swanst. 447; but see *Fytche v. Fytche*, L. R. 7 Eq. 494.



## CHAPTER XII.

## PERFORMANCE.

The doctrine of performance is based upon the maxim of equity, which imputes an intention to fulfil an obligation; in other words, that when a person covenants to do an act, and he does some other act that is capable of being applied towards a performance of his covenant, he shall be presumed to have had the intention of performing his covenant when he did the other act.

Equity imputes an intention to fulfil an obligation.

Under this subject two classes of cases occur.

I. Where there is a covenant to purchase and settle lands, and a purchase of lands is made, but is not expressed to be in pursuance of such covenant, and no settlement of the purchased lands is made.

II. Where there is a covenant to leave property, and the covenantor dies intestate, and thereby property comes in fact to the covenantee.

I. The doctrine upon the first branch of this subject was fully discussed in the leading case of *Lechmere v. Earl of Carlisle*.<sup>1</sup> There, Lord Lechmere, upon his marriage with Lady Elizabeth Howard, daughter of the Earl of Carlisle, covenanted to lay out within one year after his marriage £6000,

I. covenant to purchase land and land is purchased.

<sup>1</sup> 3 Peere Wms. 211; Ca. t. Talb. 80.

her portion, and £24,000 (amounting in the whole to £30,000) in the purchase of *freehold lands in possession*, in the south part of Great Britain, with the consent of the Earl of Carlisle and the Lord Morpeth (the trustees), to be settled on Lord Lechmere for life, remainder for so much as would amount to £800 a year to Lady Lechmere, for her jointure, remainder to first and other sons in tail male, remainder to Lord Lechmere, his heirs and assigns forever; and Lord Lechmere also covenanted that until the £30,000 should be laid out in lands, interest should be paid to the persons entitled to the rents and profits of the lands when purchased. Lord Lechmere was seized of some lands in fee at the time of his marriage; and after his marriage he purchased some *estates in fee* of about £500 per annum, some *estates for lives and some reversionary estates in fee* expectant on lives, and also *contracted* for the purchase of some *estates in fee in possession*; he then died intestate, without issue, and without having made any settlement of any estate. None of the aforesaid purchases or contracts were made by Lord Lechmere with the consent of the trustees. Upon a bill being filed by Mr. Lechmere, the heir-at-law of Lord Lechmere, for specific performance of the covenant, and to have the £30,000 laid out as therein agreed; it was held by Jekyll, M. R., that he was entitled to specific performance of such covenant, and that none of the land which was permitted to descend to the heir was to be taken as part performance of the covenant. However, on appeal, Talbot, L. C., reversed the decree of the Master of the Rolls as to the *freehold* lands purchased and contracted to be purchased *in fee simple in possession after* the covenant, though with but part of the £30,000, and left to descend; and these were declared to go in part performance of the covenant. His Lordship, after

distinguishing and putting aside the question of *satisfaction*,<sup>1</sup> which he said did not properly fall within the case, continued as follows:—"As to all  
 "the estates purchased previously to the articles,  
 "there is no color to say they can be intended in  
 "performance of the articles: and as to the lease-  
 "holds for life, and the reversion in fee expectant  
 "on the estates for life, it cannot be taken they  
 "were purchased in pursuance of the articles, be-  
 "cause they could not answer the end of them.  
 "But as to the other purchases (in fee simple in  
 "possession), why may they not be intended as  
 "bought with a view to make good the articles?  
 "Lord Lechmere was bound to lay out the money  
 "with the liking of the trustees, but there was no  
 "obligation to lay it out all at once, nor was it  
 "hardly possible to meet with such a purchase as  
 "would exactly tally with it. Parts of the land  
 "purchased are in fee simple in possession, in the  
 "south part of Great Britain, and near to the family  
 "estate. But it is said they are not bought with  
 "the liking of the trustees. The intention of nam-  
 "ing trustees was to prevent unreasonable purchases,  
 "and the want of this circumstance, if the purchases  
 "are agreeable in other respects, is no reason to  
 "hinder why they should not be bought in per-  
 "formance of the articles. It is objected that the  
 "articles say the land shall be conveyed immedi-  
 "ately. It is not necessary that every parcel should  
 "be conveyed as soon as bought, but after the whole  
 "was purchased, for it never could be intended  
 "that there should be several settlements under the  
 "same articles. Where a man is under an obliga-  
 "tion to lay out £30,000 in lands, and he lays out  
 "part as he can find purchases, which are attended  
 "with all material circumstances, it is more natural

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<sup>1</sup> Wilcocks v. Wilcocks, 2 Vern. 558.

“to suppose those purchases made with regard to ‘the covenant than without it. *When a man lies ‘under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under ‘than to a voluntary act independent of the obligation.’”*

Deductions from *Lechmere v. Carlisle* (Earl).

From the exhaustive judgment above quoted, besides the principal point for which the case was cited, we may consider four other points in connection with this subject as well established:—

1. Performance may be good, *pro tanto*.

1. Where the lands purchased are of less value than the lands covenanted to be purchased and settled, they will be considered as purchased in part performance of the covenant.

2. Previously purchased lands do not count.

2. Where the covenant points to a *future* purchase of lands, it cannot be presumed that lands of which the covenantor was seized at the time of the covenant, descending to his heir, were intended to be taken in part performance of it.

3. Lands purchased, if unsuitable, do not count.

3. It cannot be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as a performance.<sup>1</sup>

4. Trustees' consent to purchase, —want of, is immaterial.

4. Although by the settlement the consent of the trustee is required, still the absence of that consent will not necessarily prevent the presumption of performance from arising, if the other circumstances of the purchase are favorable to such presumption; and so immaterial is the absence of the trustees' consent, that in the case of *Sowden v. Sowden*,<sup>2</sup> the doctrine of *Lechmere v. Earl of Carlisle* was extended to a case even where the covenant was to pay money to trustees, to be laid out by them in a purchase of land, and the covenantor himself purchased land, and took a conveyance to himself of the fee, and died intestate without having made a settlement.

<sup>1</sup> Pinnell v. Hallet, Amb. 106.

<sup>2</sup> 1 Bro. C. C. 582.

It is to be observed, that a covenant to purchase lands generally is a mere specialty debt, and will not create a specific lien on the lands afterwards purchased, although the presumption may arise that they were purchased by the covenantor, intending them to go in performance of the covenant in his marriage articles; and, consequently, such a covenant will not affect a purchaser or mortgagee of the lands even with notice.<sup>1</sup> But it might be otherwise if the covenant was to acquire and settle certain specified lands; and it would certainly be otherwise if the covenant was to settle specified lands already acquired by the covenantor.<sup>2</sup>

It may be well to refer here briefly to a class of cases, occasionally referred to the head of performance, but distinguishable therefrom, and depending in fact upon the rule that the *cestui que trust* of a fund is entitled to follow that fund into any subject-matter into which it may have been wrongfully converted. In the case of *Trench v. Harrison*,<sup>3</sup> the trustees of a marriage settlement being empowered by it to invest the trust-funds in freeholds or copyholds of inheritance, with the consent of the husband and wife, authorized the husband to purchase a certain estate, as an investment of part of the trust-funds; and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent. It was held, nevertheless, that as between the husband and the trustees, he must be considered to have purchased the estate for them. These cases of following trust-money into land have some resemblance to the case of performance,

Covenant to purchase does not create a lien on lands purchased.

Right of *cestui que trust* to follow trust-fund,—distinguished from performance.

<sup>1</sup> Deacon v. Smith, 3 Atk. 323.

<sup>2</sup> Mornington v. Keane, 2 De G. & J. 292.

<sup>3</sup> 17 Sim. 111; and see Taylor v. Plumer, 3 Maul & Selw. 562.

properly so called ; but in essentials they differ materially. In the case of performance the husband is under an obligation to purchase the land, while in the cases of following trust-money, the husband is under no such obligation, and therefore all turns on the circumstance that the purchase was in fact made with trust-money, with regard to which it is a well-settled rule that the money may, in most cases, be followed into the land in which it is invested.<sup>1</sup>

II. Covenant to pay or leave by will, and share under the Statute of Distribution.

II. The second class of cases ranked under the head of performance is, where a husband covenants to leave his wife a gross sum of money, or part of his personalty, and he dies intestate, so that she becomes entitled to a portion of his personal property under the Statute of Distributions. The question sometimes arises, whether such distributive share is a performance of the covenant, or whether she can claim both the distributive share and the money due under the covenant. The solution of this question depends on the two following rules which the cases on the point suggest :—

(1.) When husband's death occurs at or before time when the obligation accrues, distributive share a performance.

1. When the death of the husband occurs at the time, or previous to the time, when the obligation ought, by the terms of the covenant, to be performed, her distributive share will be taken as a performance of the covenant, *pro tanto* or *in toto*, as that share is, on the one hand, less than, or, on the other hand, equal to, or greater than, the sum due under the covenant.

*Blandy v. Widmore*,—a case of performance *in toto*, where an immediate intestacy.

Thus, in *Blandy v. Widmore*,<sup>2</sup> A. covenanted, previously to his marriage, to leave his intended wife £620. The marriage took place, and the husband died intestate. The wife became entitled to a moiety amounting to more than £620 of her hus-

<sup>1</sup> *Lench v. Lench*, 10 Ves. 511.

<sup>2</sup> 2 Smith L. C. 391.

band's personal property, under the Statute of Distributions. The Lord Chancellor held, that this was a performance of the covenant, on the following ground—that the covenant was to be taken as *not broken*, for the husband had *left* his widow \$620 and upwards; that, therefore, she could not come in first as a creditor for the £620 under the covenant, and then for a moiety of the surplus under the statute. Similarly, in the case of *Goldsmid v. Goldsmid*,<sup>1</sup> it was decided, on the authority of *Blandy v. Widmore*, that where the trusts of a testator's *will* failed, and his property became divisible as in case of intestacy, the widow's distributive share under the statute was a performance of the covenant by the husband under the marriage articles, that his executors should, after his death, pay her a certain sum of money. In his judgment, Sir T. Plumer, M. R., makes the following observations:—‘Lord Eldon, in *Garthshore v. Chalie*,<sup>2</sup> speaking of *Blandy v. Widmore*, and other cases, says, ‘These cases are distinct authorities that where a husband covenants to leave or to pay at his death a sum of money to a person who, independent of that agreement, by the relation between them and the provision of the law attending upon it, will take a provision, the covenant is to be construed with reference to that.’ Considering the contract as made with that reference, it must be interpreted as intended to regulate what the widow is to receive, and consequently when the event of intestacy ensues, the single question is, Does she not obtain that for which she contracted? If the object of the covenant is that the executors of the husband shall pay to the widow a given sum, and in her character of widow, created by the same marriage contract,

*Goldsmid v. Goldsmid*,—the same, where a resulting intestacy.

<sup>1</sup> 1 Swanst. 211.

<sup>2</sup> 10 Ves. 1.

she in fact obtains from the executor or administrator that sum, the court is bound to consider that as payment under the covenant. *These are not cases of an ordinary debt; during the life of the husband there is no breach of the covenant, no debt; the covenant is to pay after his death, and the inquiry is not whether the payment of the distributive share is satisfaction, but a question perfectly distinct, whether it is performance.*"

(2.) Where husband's death occurs after obligation accrues, distributive share not a performance.

2. Where the decease of the husband occurs after the obligation of the covenant has already risen, or in other words, after a breach of such covenant, the widow's distributive share is not a performance of the obligation.

Thus in *Oliver v. Brickland*,<sup>1</sup> the husband covenanted to pay a sum *within two years* after marriage, and if he died his executors should pay it. He lived *after the two years* and died intestate, leaving a larger sum than what he covenanted to pay, to devolve upon his widow as her distributive share. The Master of the Rolls held that she was entitled both to the money under the covenant and to her distributive share of the residue. Here it will be seen that *there was a breach of covenant* before the death, and that from the moment of such breach a *debt* accrued due to the covenantee; whereas in the first class of cases the obligation to pay did not arise until the time at which the distributive share devolved.

Performance distinguished from satisfaction.

Finally, it must be observed, that whereas in satisfaction the presumption will not hold (at least, in the case of creditors) where the thing substituted is less beneficial either in amount, or certainty, or time of enjoyment, or otherwise, than the thing contracted for; in performance the thing done,

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<sup>1</sup> Cited 1 Ves. Sr. 1; 3 Atk. 420.



even though less beneficial in amount, certainty, &c., than the thing contracted to be done, will, other circumstances concurring, be taken as performance *pro tanto* of the covenant.<sup>1</sup>

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<sup>1</sup> Cox's note to *Blandy v. Widmore*, 1 P. Wms. 323.

## CHAPTER XIII.

## SATISFACTION.

Satisfaction sup-  
poses intention.

AN important distinction exists between satisfaction and performance. Satisfaction, it is true, like performance, supposes intention; nevertheless, in satisfaction, the thing done is something different from the thing covenanted to be done, and is, in fact, a *substitute* for the thing covenanted to be done; whereas in performance, the *identical* act which the party contracted to do is considered to have been done.<sup>1</sup>

The cases on the doctrine of satisfaction may be divided into *four* classes.

I. Satisfaction of debts by legacies.

II. Satisfaction of legacies by subsequent legacies.

III. Satisfaction of legacies by portions.

IV. Satisfaction of portions by legacies.

I. Of debts by  
legacies.

I. Satisfaction of debts by legacies.

The general rule is, "that if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall nevertheless be in satisfaction of

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<sup>1</sup> Goldsmid v. Goldsmid, 1 Swanst. 211.

the debt, so that he shall not have both the debt and the legacy."<sup>1</sup> And this presumption is founded upon the maxim, *Debitor non presumitur donare*. Presumption no favored. But the presumption is not favored by the court, and the court's leaning against the presumption has led it to lay hold of trifling circumstances in order to exclude the presumption altogether.

From the various cases on the subject may be collected the following rules:—

1. Words ordinarily employed to grant a legacy, show an intention of favor rather than an intention to fulfil an obligation, *i. e.*, "a legacy imports a bounty." 1. Legacy imports bounty.

2. If the debtor bequeaths exactly the same sum, *simpliciter*, as the debt, it will be taken as a satisfaction. *Debitor non presumitur donare*.<sup>2</sup> 2. If legacy be equal to debt.

3. If the legacy be less than the debt, it has never been held to go in satisfaction, even *pro tanto*.<sup>3</sup> 3. If legacy be less than debt.

4. The legacy of a sum, *simpliciter*, greater than the debt will be taken as a satisfaction of the debt, and only imports bounty as to the excess of the legacy over the debt.<sup>4</sup> 4. Legacy greater than debt.

5. The presumption will not be raised where the debt of the testator was contracted subsequently to the making of the will; for the testator could have no intention of making any satisfaction for what was not at the time in existence.<sup>5</sup> 5. Debt contracted after will.

6. Equity will lay hold of slight circumstances to indicate an intention that the legacy shall not go as a satisfaction. A few cases will illustrate how 6. Circumstances rebutting the presumption.

<sup>1</sup> Talbot v. Shrewsbury, Prec. Ch. 394; 2 Sm. L. C. 352.

<sup>2</sup> Haynes v. Mico, 1 Bro. C. C. 130.

<sup>3</sup> Eastwood v. Vinke, 2 P. Wms. 617. [Strong v. Williams, 12 Mass. 389.]

<sup>4</sup> Talbot v. Shrewsbury, 2 Smith L. C. 352. —

<sup>5</sup> Cranmer's Case, 2 Salk. 508. [Horner v. McGaughy, 62 Pa. St. 187.]

strong the leaning in equity is against the presumption of satisfaction.

Direction in will  
for payment of  
debts *and* lega-  
cies.

Where there is an express direction in the will for payment of *debts AND legacies*, the court will, it seems, infer that it was the intention of the testator that both the debt and the legacy should be paid to his creditor. Thus, in *Chancey's case*,<sup>1</sup> A. being indebted for wages to a maid-servant who had lived with him a considerable time, gave her a bond for £100, and in the consideration of the bond, it appeared to be for *wages*. Afterwards by his will, he gave her a legacy of £500, stating in his will that it was “*for her long and faithful service* ;” and he directed *that all his debts AND legacies should be paid*. It was held, that the legacy was not a satisfaction of the debt due on the bond, and the maid servant had both her debt and her legacy. The court said, that the testator, by the express words of his will, had devised “*that all his debts and legacies should be paid* ;” and this £100 being then a *debt*, and the £500 being a *legacy*, it was as strong as if he had directed that both the bond and the legacy should be paid. But it is doubtful whether a direction to pay debts *alone* will be sufficient to rebut the presumption of satisfaction. In *Edmunds v. Lowe*,<sup>2</sup> Wood, V.-C., held that a charge of debts standing alone was not sufficient; nevertheless, the weight of authority seems to be in favor of the proposition, that if not absolutely sufficient in itself to rebut the presumption, such a charge is at least a strong circumstance against the presumption of satisfaction.<sup>3</sup>

Direction to pay  
debts *alone*.

<sup>1</sup> 1 P. Wms. 408; 2 Smith L. C. 353. [See *Strong v. Williams*, 12 Mass. 389.]

<sup>2</sup> 3 K. & J. 318, 321.

<sup>3</sup> *Rowe v. Rowe*, 2 De G. & Sm. 297, 298; *Russel v. Hankins*, 7 W. R. 314; *Cole v. Willard*, 25 Beav. 568; *Pinchin v. Simms*, 30 Beav. 119; *Glover v. Hartcup*, 34 Beav. 74.

Another ground for avoiding the presumption of the satisfaction of a debt by a legacy, arises where the time fixed for the payment of the legacy is different from the time when payment of the debt is demandable. Thus in *Clarke v. Sewell*,<sup>1</sup> the testator gave a legacy of £10,000 to his mother, to be paid by the trustees *one month* after his decease. The mother was entitled to £2,000 from the estate of her son, in consequence of his having succeeded to the stock-in-trade of his father, and payment of this £2,000 was demandable immediately upon the death of the son. It was held that there was no satisfaction—that in order to be so deemed, the £10,000 legacy ought to have become payable immediately on the testator's death, at which time the debt due from the son to the mother became payable; whereas, the legacy was to be paid *one month after* the testator's death.<sup>2</sup> On the other hand, in *Wathen v. Smith*,<sup>3</sup> where the legacy was payable at an earlier date than the money due under the settlement, and was therefore to the greater advantage of the legatee-creditor, it was held that the presumption of satisfaction arose.

Where the legacy is contingent or uncertain, it will not be held a satisfaction of a debt.<sup>4</sup> Thus, in *Barrett v. Beckford*,<sup>5</sup> a testator being under an obligation to pay an annuity to A., by his will gave the *residue* of his property to his mother and A. for life. It was held that this legacy of a moiety of the residue to A. was not a satisfaction of the annuity to A.; that in order that the gift should be deemed a satisfaction, it was necessary that the

<sup>1</sup> 3 Atk. 96.

<sup>2</sup> Haynes v. Mico, 1 Bro. Ch. Ca. 129.

<sup>3</sup> 4 Mad. 325.

[<sup>4</sup> Van Piper v. Van Piper, 1 Green Ch. 1; Byrne v. Byrne, 3 S. & R. 54.]

<sup>5</sup> 1 Ves. Sr. 519.

subject-matter of the gift and the debt should be exactly of the same nature, and of equal certainty. From the case of *Devese v. Pontet*,<sup>1</sup> it will be seen that a gift, by will, of a residue to a wife, will not be a satisfaction of a debt due to her, and that the rule of *Blandy v. Widmore* in cases of intestacy is inapplicable to cases where there is an operative will.<sup>2</sup>

The four modes of less.

The Roman Law used to hold, and English common sense agrees, that a payment may be *less* in any one of *four* ways, viz., *re*,—*i. e.*, in amount; *loco*,—*i. e.*, in convenience of place; *tempore*,—*i. e.*, in time; and *causa*,—*i. e.*, in quality.

If the like distinctions were familiar in English Law, all the foregoing cases of the court's leaning against satisfaction would be resolvable into one case, namely, a legacy of *less* than the debt.

II. Satisfaction of legacies by subsequent legacies.

II. Satisfaction of legacies by subsequent legacies. Two classes of cases occur under this head, viz :—

(*a.*) Where the legacies are by the same instrument.

(*b.*) Where the legacies are by different instruments.

(1.) Under the same instrument.  
(*a.*) Equal legacies are substitutive.

(1.) Where legacies of quantity in the *same* instrument, whether a will or codicil, are given to the same person *simpliciter*, and are of *equal* amount, one only will be good, nor will small differences in the way in which the gifts are conferred afford internal evidence that the testator intended they should be cumulative. Thus, in *Greenwood v. Greenwood*,<sup>3</sup> the testatrix gave “to her niece, Mary Cook, the wife of John Cook, £500,” and afterwards in the same will, amongst many other lega-

<sup>1</sup> 1 Cox, 188.

<sup>2</sup> Bartlett v. Gillard, 3 Russ. 194.

<sup>3</sup> 1 Bro. C. C. 31, n.

cies, "to her cousin, Mary Cook, £500 for her own use and disposal, notwithstanding her coverture." It was held that Mary Cook was entitled to one legacy only, of £500, and that the same was for her separate use.

Where, however, the legacies given by the *same* instrument are of *unequal* amount, they will be considered cumulative.<sup>1</sup>

(2.) Where a testator by *different* testamentary instruments has given legacies of quantity *simpliciter* to the same person, the court, considering that he who has given more than once, must, *prima facie*, mean more than one gift, awards to the legatee all the legacies, and it is immaterial whether the subsequent legacy differs or not in any particulars from the prior one.<sup>2</sup> But though the legacies are in different instruments, if they are not given *simpliciter*, but the motive of the gift is expressed, and in such instruments the *same motive* is expressed and the *same sum* is given, the court considers these two coincidences as raising a presumption that the testator did not, by a subsequent instrument, mean another gift, but only a repetition of the former gift.<sup>3</sup> But the court raises this presumption *only* where the double coincidence occurs, of the *same motive* and the *same sum*, in both instruments. For if in either instrument there be, on the one hand, *no motive*, or a *different* or *additional* motive expressed, and the *sum* be the *same* in both instruments,<sup>4</sup> or, on the other hand, though the *same*

(b.) Unequal legacies are cumulative.

(2.) Under different instruments, — Legacies whether equal or unequal are cumulative.

Unless same motive expressed and same sum.

<sup>1</sup> Hooley v. Hatton, 1 Bro. C. C. 390. n.; Curry v. Pile, 2 Bro. C. C. 225; Yockney v. Hansard, 3 Hare, 620. [Edwards v. Rainer, 17 Ohio St. 597.]

<sup>2</sup> Roch v. Callen, 6 Hare, 531; Russell v. Dickson, 4 H. L. Cas. 293. [DeWitt v. Yates, 10 Johns. 156.]

<sup>3</sup> Benyon v. Benyon, 17 Ves. 34.

<sup>4</sup> Roch v. Callen, 6 Hare, 531; Ridges v. Morrison, 1 Bro. C. C. 388.

*motive* be expressed in different instruments, yet the *sums* are different,<sup>1</sup> the presumption will be in favor of cumulation rather than of substitution. Where, however, a second instrument expressly refers to the first, or where, by intrinsic evidence, the latter instrument was a mere revision, explanation, or copy of the former, it will so far be held substitutional.<sup>2</sup>

Extrinsic evidence,—when admissible and when not.

As to the question, when extrinsic evidence is receivable in favor of or against the presumption, the authorities seem to lead to the following conclusions.<sup>3</sup>

Where the court raises the presumption,—evidence to confirm instrument admissible.

(*a.*) That where the court itself raises the presumption against double legacies—where, for instance, two legacies of equal amount are given by one instrument, parol evidence is admissible to show that the testator intended the legatee to take both, for that is in support of the apparent intention of the will, and is in fact in restoration of the plain effect of the instrument.

Where the court does not raise the presumption,—no evidence to contradict instrument admissible.

(*b.*) But where the court does not raise the presumption—where, for instance, legacies of equal amount are given *simpliciter* by different instruments—parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will, and is in destruction of the plain effect of the instrument. Parol evidence being therefore excluded in this case, the question becomes one solely of construction.<sup>4</sup>

<sup>1</sup> Hurst v. Beach, 5 Mad. 352; Baby v. Miller, 1 E. & A. 218.

<sup>2</sup> Fraser v. Byng, 1 Russ. & My. 90; Coote v. Boyd, 2 Bro. C. 521; Currie v. Pye, 17 Ves. 462; and see Whyte v. Whyte, L. R. 17 Eq. 50.

<sup>3</sup> 2 Smith, L. C. 335.

<sup>4</sup> Hurst v. Beach, 5 Mad. 351; Hall v. Hill, 1 Dr. & War. 94; Lee v. Pain, 4 Hare, 216.



III. The satisfaction or, as it is more correctly termed, the ademption<sup>1</sup> of a legacy by a portion; and, III. and IV. Satisfaction of legacy by portion, and vice versa.

IV. The satisfaction of a portion by a legacy.

“Where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving a portion, and by a sort of artificial rule—in the application of which legitimate children have been very harshly treated—upon an artificial notion, and a sort of feeling called a leaning against double portions—if the father advances a portion on the marriage of that child, the portion is presumed to be an ademption of the legacy *pro tanto* or *in toto*, as the money advanced is respectively less than, or equal to, or greater than the sum expressed to be given as a legacy.”<sup>2</sup> General rule.

The following observations apply generally as well to the ademption of a legacy by a portion, as to the satisfaction of a portion by a legacy:—

1. In the case of double provisions, the doctrine of satisfaction does not in general apply to legacies and portions to strangers, but only where the parental relation, or its equivalent, exists. If, therefore, a person give a legacy to a mere stranger, and Rule does not apply as to legacies and portions to a stranger, including (for this purpose) an illegitimate child.

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<sup>1</sup> “When the will is made first, and the settlement afterwards, it is always treated as a case of what is called ademption—that is to say, the benefits given by the settlement are considered to be an ademption of the same benefits given to the same child by the will.

“With reference to cases . . . of a previous settlement and a subsequent will . . . it is now quite settled that there is no difference between the two cases, beyond the verbal difference that the term satisfaction is used where the settlement has preceded the will, and the term ademption where the will has preceded the settlement. In substance there is no distinction between the principles applied to the two classes of cases.”—*Coventry v. Chichester*, 2 H. & M. 159.

<sup>2</sup> *Pym v. Lockyer*, 5 My. & Cr. 29.

then make a settlement on that stranger; or first agree to make a settlement on that stranger, and then bequeath a legacy to him; the stranger is entitled to claim under both instruments: and for the purpose of this doctrine it is settled that an illegitimate child is, in the eye of the law, a stranger; and that, unless other circumstances are found than the bare relation of parentage "by nature," the illegitimate child is at liberty to claim a double provision.<sup>1</sup>

Unless the legacy and portion be for the same specific purpose.

But the general rule will apply though the testator stands neither in the legal nor assumed relation of a parent to the legatee, if the legacy be given for a particular purpose, and the testator advances money for the same purpose.<sup>2</sup>

The presumption against double portions is founded on good sense.

The presumption against double portions has been characterized as a hard and artificial rule, but, on examination, it will appear to be founded on good sense and justice. In *Suisse v. Lowther*,<sup>3</sup> Wigram, V.-C., makes the following remarks:—"The rule of presumption, as I before said, is against double portions as between parent and child; and the reason is this—a parent makes a certain provision for his children by will, if they attain 21, or marry, or require to be settled in life; he afterwards makes an advancement to a particular child. Looking at the ordinary dealings of mankind, the court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his life-time the obligation which he would otherwise have discharged at his death; and having come to that conclusion, as the result of general experience, the court acts

<sup>1</sup> Ex parte Pye, 18 Ves. 140.

<sup>2</sup> Monck v. Monck, 1 Ball & B. 303; Parkhurst v. Howell, L. R. 6 Ch. 136. [Langdon v. Astor, 16 N. Y. 9.]

<sup>3</sup> 2 Hare, 435.

upon it, and gives effect to the presumption that a double provision was not intended. If, on the other hand, there is no such relation either natural or artificial, the gift proceeds from the mere bounty of the testator; and there is no reason *within the knowledge of the court* for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by another; there is no reason why the court should assign any limit to that bounty which is wholly arbitrary. The court, as between strangers, treats several gifts as *prima facie* cumulative. The consequence is, as Lord Eldon observed, that a natural child, who is in law a stranger to the father, stands in a better situation than a legitimate child, for the advancement in the case of the natural child is not, *prima facie*, an ademption." But this anomaly is an accidental consequence of the rule, and the reasons of the rule which are good in themselves cannot be affected by what is accidental.

2. The next general proposition is, that although the doctrine of satisfaction does not, as a general rule, apply where the donee is a stranger, it may and does apply where the donor has placed himself "*in loco parentis*" towards the beneficiary.

As to what constitutes the *quasi-parental* relation, which is signified by the words "putting one's self *in loco parentis*," the case of *Powys v. Mansfield*<sup>1</sup> is in point. There the question arose whether Sir John Barrington, who had by his will given £10,000 to one of his nieces, and had afterwards settled £10,000 on the marriage of the same niece, stood "*in loco parentis*" to the niece, so as to give rise to the application of the doctrine of satisfaction. The niece was one of the daughters of Sir

The presumption applies where the donor has placed himself *in loco parentis* to the donee.

What is putting one's self *in loco parentis*.

<sup>1</sup> 6 Sim. 544; 3 My. & Cr. 359.

John's brother, Fitzwilliam, and the general relations subsisting between the uncle and his nieces were thus stated in the evidence: "That Sir Fitzwilliam, in compliance with the wishes of Sir John, resided near Sir John, in the Isle of Wight, and maintained a more expensive establishment than his (Sir Fitzwilliam's) income (which did not exceed £400 a year) would allow of; that Sir John and his brother lived on the most affectionate terms with each other; that for several years Sir John gave his brother £1000 a year; that he took the greatest interest in his nieces, behaved to them as a father, and always acted to them as the kindest of parents, not showing more partiality to one than to another; that he frequently gave them pocket money, and made them other presents, and occasionally advanced money to defray the expense of their clothing and education; that he allowed them to use his horses and carriages, and had them frequently to dine with him, and that one or other of them was almost always staying at his house; that he was consulted as to the appointment of their masters and governesses, and as to the marriages of such of them as were married; and that on the plaintiff's marriage, the terms of the settlement were negotiated between the plaintiff and Sir John, and their respective solicitors, without any interference on the part of Sir Fitzwilliam. Upon these facts, the Lord Chancellor Cottenham, reversing the decision of the Vice-Chancellor Grant, held that Sir John had placed himself "*in loco parentis*," making the following observations;—"The authorities leave in some obscurity the question as to "what is to be considered as meant by the expression '*in loco parentis*.' Lord Eldon, however, in "*Ex parte Pye* has given to it a definition which I "readily adopt. He says, it is a person meaning "to put himself *in loco parentis*, in the situation,

“that is to say, of the person described as the lawful father of the child, *with reference to the office and duty of such father to make provision for the child*. The Vice-Chancellor says it must be a person who has so acted towards the child as that <sup>The parent of the child may be alive.</sup> he has thereby imposed on himself a moral obligation to provide for it, and that the designation will not hold where the child has a father with whom it resides, and by whom it is maintained. This seems to infer that the *locus parentis* assumed by the stranger must have reference to the pecuniary wants of the child, and that Lord Eldon’s definition is to be so understood, and I so far agree with it; but I think the other circumstances required are not necessary to work out the principle of the rule or to effectuate its object. The rule, both as applied to a father and to one *in loco parentis*, is founded upon the presumed intention. A father is supposed to intend to do what he is in duty bound to do—namely, to provide for his child according to his means. So, one who has assumed that part of the office of a father is supposed to intend to do what he has assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow. The having so acted towards a child as to raise a moral obligation to provide for it, affords a strong inference in favor of the fact of the assumption of the character; and the child having a father with whom it resides, and by whom it is maintained, affords some inference against it; but neither inference is conclusive.”<sup>1</sup>

3. Whereas in the case of satisfaction of a debt by a legacy, equity leans (as we have seen) most strongly against the presumption, the leaning of

(3.) Leaning against double portions.

<sup>1</sup> Cooper v. Cooper, 21 W. R. 501.

the court is all the other way in the case of satisfaction of portion by legacy or of legacy by portion. In this latter case the presumption of satisfaction will not be repelled, "by slight circumstances of difference between the advance and the portion," just as the like differences in the case of alleged satisfaction of debt by legacy would not repel, but would (as we have seen) confirm the contrary leaning of the court in that case against satisfaction. And even very material differences do not seem to count. Thus, in the case of *Lord Durham v. Wharton*<sup>1</sup> a father by will bequeathed £10,000 to trustees, one half to be paid at the end of three years, and the other half at the end of six years from his death, with interest in the meanwhile, and declared the trusts to be for his daughter for life, and after her decease in trust for her children, as she should appoint by deed or will, and in default of appointment for all her children equally; and subsequently, on the marriage of the daughter, he agreed to give her £15,000, to be paid to the intended husband, he securing by his settlement pin money and a jointure for his wife, and portions for the younger children of the marriage. It was held that the £10,000 legacy was satisfied by the £15,000 portion. It is to be observed how strong this decision was. By the will, the daughter took a life interest; by the settlement, a jointure. By the will *all* the children of the daughter took; by the settlement, portions were provided only for the younger children of the particular marriage.

Same principles applicable when settlement comes before will.

And the same principles will be applied not only where, as in the above case, the will precedes the settlement, but where the order of events is, first, a settlement, secondly, a will. This was decided

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<sup>1</sup> 3 Cl. & F. 146; but see *Tussaud v. Tussaud*, 9 Ch. Div. 363.

in the case of *Thynne v. Glengall*.<sup>1</sup> There a father having, upon the marriage of his daughter, agreed to give her a portion of £100,000 consols, made an actual transfer of one-third thereof to the *four trustees* of the marriage settlement, and gave them his bond for the transfer of the remainder in like stock upon his death; the stock to be held by them in trust for the daughter's separate use for life, and after her death for the children *of the marriage*, as the *husband and she* should jointly appoint. The father afterwards by his will gave to *two* of the trustees a moiety of the *residue* of his personal estate in trust for the daughter's separate use for life, remainder for *her* children generally as *she* should by deed or will appoint. And it was held that the moiety of the residue given by the will was a satisfaction of the sum of stock not yet actually transferred, being the portion thereof secured by the bond, and this notwithstanding the differences of the trusts. With reference to this subject, the following remarks were made in the House of Lords:—"We must throw out of consideration all the cases in which questions have arisen as to legacies being or not being held to be in satisfaction of a debt; for, however similar the two cases may appear at first sight, the rules of equity, as applicable to each, are absolutely opposed the one to the other. Equity leans against legacies being taken in satisfaction of a debt, but leans in favor of a provision made by will being in satisfaction of a portion by contract, feeling the great improbability of a parent intending a double portion for one child, *to the prejudice generally, as in the present case, of other children*. In the case of a debt, therefore, small circumstances of difference between the debt and

Not a question of satisfaction of a debt.

<sup>1</sup> 2 H. L. Cas. 131; see also *Russell v. St. Aubyn*, L. R. 2 Ch. Div. 398; *Mayd v. Field*, L. R. 3 Ch. Div. 587, *Bethel v. Abraham*, L. R. 3 Ch. Div. 590, 591, n.

legacy are held to negative any presumption of satisfaction; whereas in the case of portions, small circumstances are disregarded. So in the case of a debt, a smaller legacy is not held to be in satisfaction of part of a larger debt; but in the case of portions, it is held to be a satisfaction *pro tanto*. In the case of a debt, a gift of the whole or part of the residue cannot be a satisfaction, because it is said, the amount being uncertain, it may prove to be less than the debt. In considering whether this rule applies to portions, which is the only question in this case, the reason of the rule as applicable to debts must not be lost sight of, because as a portion may be satisfied *pro tanto* by a smaller legacy, the reason given for the rule as applicable to debts cannot apply to portions. And, on the contrary, as the residue must be supposed by the testator to have been of some value, it would appear on principle that it ought to be considered as a satisfaction either altogether, or *pro tanto*, according to the amount. For why should £1000, given as a residue, not have the same effect upon a larger portion as £1000 given as a money legacy."

Where settlement comes first, persons taking under it are *quasi-purchasers*, with right to elect between the settlement and the will.

It will be seen that there is no objection in principle to the application of this doctrine where the will precedes the settlement, and the trusts are dissimilar; yet in the case where the settlement comes first, a difficulty necessarily arises. For, in this latter case, the persons entitled under the settlement are *quasi-purchasers*, and as such cannot be deprived against their will of their rights upon any presumed intention of the testator. At the utmost they can only be put to election whether to take under the will or under the settlement, and the presumption against double portions will be much more easily rebutted than where the will precedes the settlement. The distinction is thus stated by Lord Cranworth, in his judgment in *Chichester v. Cov-*



entry,<sup>1</sup>—"When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption." And, in fact, in the before-stated case of *Thynne v. Glengall*,—the settlement in that case having preceded the will,—an inquiry was directed whether it was for the benefit of the daughter and her children to take under the will or under the settlement, and she was to elect accordingly.

It is also to be observed that in *Thynne v. Glengall*, the question of satisfaction arose only regarding the *untransferred* stock; and, in fact, the principle of satisfaction does not apply at all *as regards advances actually made* upon a settlement or other advancement previously to the will,<sup>2</sup> a difference never to be lost sight of between the two cases of will first and settlement afterwards, and settlement first and will afterwards.

It was for some time an unsettled point as to whether, if the sum given by a second instrument was smaller than that given by the first, the less sum operated as a total satisfaction of the larger. This question can, of course, be of practical value only where the will precedes the settlement; for where the order is reversed, and the settlement comes first, the rights of those taking under a positive contract such as a settlement is, cannot be

Sum given by second instrument, if less, satisfaction *pro tanto*.

<sup>1</sup> L. R. 2 H. L. 87; but see *Bennett v. Houldsworth*, L. R. 6 Ch. Div. 671.

<sup>2</sup> *Watson v. Watson*, 33 Beav. 574; *Re Peacock's Estate*, L. R. 14 Eq. 236; *Hatfield v. Minet*, 8 Ch. Div. 136.

affected or modified by subsequent voluntary gifts. It was for a long time considered that the settlement of a smaller portion effected a complete ademption of a larger legacy given by a previous will. But it was left to Lord Cottenham in the case of *Pym v. Lockyer*,<sup>1</sup> to establish the true and logical rule that an advancement subsequent to a will, if less in amount than the sum given by the will, was to be considered a satisfaction *pro tanto* only.

Legacy to a child to whom father is indebted.

Where a parent gives a legacy to a child to whom he is already *indebted*, the case stands on the same footing as a legacy by any other person in satisfaction of a *debt*, not being a portion; hence a subsequent legacy will not, in the absence of intention, express or implied, be considered as a satisfaction of the debt, unless it be either equal to or greater than the debt, in amount, and unless the presumption of satisfaction be not repelled by any of those slight circumstances which will take a bequest of such amount to a stranger out of the general rule.<sup>2</sup>

Or to a wife.

And the same rules apply to a legacy to a wife to whom the husband is indebted.<sup>3</sup>

Advancement by father to child to whom he is indebted.

Where a parent, however, being indebted to his child, makes in his lifetime an advancement to the child upon marriage, or upon some other occasion, of a portion equal to or exceeding the debt, it will *prima facie* be considered a satisfaction; and it is immaterial whether the portion be given in consideration of natural love or affection, or whether in the case of a portion to a daughter, the husband be ignorant of the debt. Thus, in *Wood v. Briant*,<sup>4</sup> a father, administrator *durante minore ætate* of his

<sup>1</sup> 5 My. & Cr. 29.

<sup>2</sup> Stocken v. Stocken, 4 Sim. 152.

<sup>3</sup> Fowler v. Fowler, 3 P. Wms. 353; Cole v. Willard, 25 Beav. 568.

<sup>4</sup> 2 Atk. 521.

daughter, who was executrix and residuary legatee of her grandmother's estate, agreed when she married with the plaintiff that she should have £800, which in the settlement was called her portion. Lord Hardwicke refused to decree an account of the grandmother's personal estate, as she had been dead twenty years; but directed that the father's representatives should account for his personal estate as to the £800 only, and interest at four per cent. from the marriage.<sup>1</sup> Lord Hardwicke said, "There are very few cases where a father will not be presumed to have paid the debt he owes to his daughter, when in his lifetime, he gives her in marriage a greater sum than he owed her, for it is very unnatural to suppose that he would choose to leave himself a debtor to her, and subject to an account."

As to "extrinsic evidence."—The rule against double portions is a presumption of law, and like other presumptions of law may be rebutted by evidence of extrinsic circumstances, *i. e.*, evidence of facts not contained in the written instrument itself. The rules on this subject may be gathered from the cases of *Hall v. Hill*<sup>2</sup> and *Kirk v. Eddowes*.<sup>3</sup> In *Hall v. Hill* the facts were as follows: the testator, on the marriage of his daughter, intended to provide a sum of £800 as her portion, and gave a bond for the sum to the husband, payable by instalments, part thereof to be paid during his life, and the residue upon his decease, and afterwards by his will bequeathed to his daughter a legacy of £800. Parol evidence was tendered on the part of the defendants to show what was the real intention of the testator. The question was,—whether the parol evidence was

Extrinsic evidence,—question of its admissibility or non-admissibility.

(1.) To vary or contradict the plain effect of document, where there is no presumption of law contrary to that effect,—extrinsic evidence is not admissible,—*Hall v. Hill*.

<sup>1</sup> *Hayes v. Garvey*, 2 J. & L. temp. Sugd. 298; *Plunkett v. Lewis*, 3 Hare, 316.

<sup>2</sup> 1 Dr. & War. 94.

<sup>3</sup> 3 Hare, 509.

admissible. The Lord Chancellor said,—“There is “no doubt of the general rule that *when by presumption you come to a construction against the “apparent intention of the instrument, that may be “rebutted by parol evidence.* What am I to do in “the present case? Here the debt was first incurred, “and then comes the will. The legacy to the “daughter by that will could not, by the general “rules of the court, be held to be a satisfaction of “the debt. The will gives a legacy simply. The “law says that this legacy is not in satisfaction of “the previous debt. I am asked now to insert in “the will a declaration by the testator which I do “not find in it, namely, that he means the legacy to “be a satisfaction of the debt, I am of opinion I “can do no such thing.”

(2.) To confirm the plain effect of the document, where there is a presumption of law contrary to that effect, — extrinsic evidence is admissible, — *Kirk v. Eddowes*.

In *Kirk v. Eddowes*,<sup>1</sup> a father bequeathed £3000 for the separate use of his daughter for life, with ulterior trusts for her children. Subsequently he gave the daughter and her husband a promissory-note for £500. The defendants alleged the £500 to have been intended as a satisfaction *pro tanto* of the legacy of £3000, and tendered parol evidence consisting of the declarations of the testator at the time of handing over the note, that it was to be in part satisfaction of the legacy of £3000. The question was,—Whether these contemporaneous declarations were to be admitted, it being observed that in this case the law did raise a presumption of partial satisfaction. Wigram, V. C., held that this evidence was admissible, and on the following grounds:—“If a second instrument do not in terms “adeem the first, but the case is of that class in “which, from the relation between the author of “the instrument and the party claiming under it “(as in the actual or assumed relation of parent

<sup>1</sup> Ibid.

“and child), or on other grounds, *the law raises a*  
 “*presumption that the second instrument was an*  
 “*ademption of the gift by the instrument of earlier*  
 “*date, evidence may be gone into, to show that*  
 “*such presumption is not in accordance with the in-*  
 “*tention of the author of the gift; and where evi-*  
 “*dence is admissible for that purpose, counter-evi-*  
 “*dence is also admissible. In such cases, the evi-*  
 “*dence is NOT admitted on either side for the pur-*  
 “*pose of proving in the first instance with what*  
 “*intent either writing was made, but for the pur-*  
 “*pose only of ascertaining whether the PRESUMPTION*  
 “*which the law has raised be well or ill founded. . .*  
 “The evidence does not touch the will, it proves  
 “only that a given transaction took place after the  
 “will was made, and proves what that transaction  
 “was, and calls upon the court to decide whether  
 “the legacy given by the will is not thereby  
 “adeemed. *Ademption of the legacy, and not rev-*  
 “*ocation of the will, is the consequence for which*  
 “the defendant contends.”<sup>1</sup>

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<sup>1</sup> See further, upon the admissibility of extrinsic evidence,  
 Wigram's *Extrinsic Evidence in Interpretation of Wills*, 4th  
 edit., 1858.

## CHAPTER XIV.

## ADMINISTRATION OF ASSETS.

**Administration.** Where a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, it often becomes material to consider the order and sometimes the proportions and mode in which the several classes of property are applicable to the liquidation of his debts. Every description of property, whether it be real or whether it be personal estate, is now liable for the payment of debts ; but for various reasons, some of them historical, and others of them merely natural, certain species of property are liable before others. When regarded in its relation to this general liability to debts, property is called *assets*, and assets again have been distinguished as *legal* and as *equitable* assets.

**1. Legal assets.** Legal assets was the name used to denote such portions of the property of a deceased person as were available at common law for the payment of his debts.

**2. Equitable assets.** Where, however, the assets were such as were available *only* in a court of equity, they were termed *equitable assets*. But it should be observed that property was not equitable assets, merely because it was an object of equitable jurisdiction. The true

principle was thus laid down by V. C. Kindersley, in *Cook v. Gregson*:<sup>1</sup> "The general proposition is clear enough, that when assets may be made available in a court of law, they are legal assets; and when they can only be made available through a court of equity, they are equitable assets. This proposition, however, does not refer to the question whether the assets can be recovered by the executor in a court of law, or in a court of equity. *The distinction refers to the remedies of the creditor, and not to the nature of the property.* The question is not, whether the testator's interest was *in se* legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a court of law, or can only obtain it through a court of equity. This, I apprehend, is the true distinction. If a creditor brings an action at law against the executor, and the executor pleads *plene administravit*, the truth of the plea must be tried by ascertaining what assets the executor has received, *and whatever assets the court of law, in trying that question, would charge the executor with*, must be regarded as legal assets. . . . I think the general principle is, that a court of law would treat as assets every item of property come to the hands of the executor, which he has recovered, or had a right to recover merely *virtute officii*, i. e., which he would have had a right to recover, if the testator had merely appointed him executor, without saying anything about his property or the application thereof."

Distinction referred to the creditor's remedies.

Legal assets were those recoverable by the executor *virtute officii*, and with which he was therefore chargeable in an action at law by a creditor.

The distinction between legal and equitable assets was formerly much more important than it is now, that importance consisting in this, viz., that out of

Legal and equitable assets,—importance of distinction between, formerly and at present.

<sup>1</sup> 3 Drew. 549; and see *Hilliard v. Fulford*, L. R. 4 Ch. Div. 389; *Job v. Job*, L. R. 6 Ch. Div. 562.

legal assets, debts of different degrees, as being either specialty or simple contract debts, were payable in certain defined priorities, in a due course of administration, that is to say, the specialty before the simple contract debts; but out of equitable assets, these two different degrees of debts were payable *pari passu* without any priority the one over the other. And this appears to be all that was meant when it was (inaccurately) stated that out of equitable assets *all* debts were payable *pari passu*. Where the court had to deal with a mixed fund of legal and equitable assets, and specialty creditors by virtue of their legal priority had exhausted the legal assets, the court, on the ground that he who seeks equity must do equity, would marshal the equitable assets in favor of the simple contract creditors by paying thereout the debts of the latter up to an equality with the specialty creditors, before proceeding to a *pari passu* distribution of the residue of the equitable assets.<sup>1</sup> However, the distinction has recently lost much of its importance, an Act having been passed in 1869 to abolish the priority of specialty over simple contract debts,<sup>2</sup> in the administration of the legal assets of deceased persons whose deaths shall have happened on or after the 1st January, 1870.

II. Equitable assets,—varieties of.

*Equitable assets are of two kinds, viz.:—*

Either (1.) Equitable assets which are so by virtue of their own nature and character. They are not attainable by the executor *virtute officii*, and were not chargeable against the executor in an action at law by a creditor.

<sup>1</sup> Plunket v. Penson, 2 Atk. 290; Bain v. Sadler, L. R. 12 Eq. 570; and see Ashley v. Ashley, L. R. 1 Ch. Div. 243; 4 Ch. Div. 757.

<sup>2</sup> Stat. 32 & 33 Vict., c. 46.



Or (2.) Equitable assets which are so created by the act of the testator, *e. g.*, by charging or devising his land for the payment of his debts.

1. Equitable assets, which are so by the nature and character of the property, and which are not attainable by the executor, *virtute officii*, consist of the following properties, viz:—

1. Equitable assets by nature of property itself,—enumeration of.

(a.) Property over which the testator has exercised a general power of appointment is equitable assets.<sup>1</sup>

(a.) Property actually appointed in exercise of general power.

(b.) The separate estate of a married woman is administered as equitable assets, all her creditors being paid *pari passu*, because it is only through a court of equity that they can make her separate property available.<sup>2</sup> Such property has, in fact (or at least, prior to the Judicature Acts, 1873–75, had, in fact,) no existence in the view of a court of common law, unless so far as regards statutory separate estate.

(b.) Separate estate of married woman.

2. The second kind of equitable assets is that created by the act of the testator charging or devising his land for the payment of the debts.<sup>3</sup>

2. Equitable assets by act of testator,—enumeration of.

Besides a great difference in the order of administration,<sup>4</sup> to be hereafter noticed, there is an important distinction between an *express* devise of lands on trust for the payment of debts, and a mere charge of debts upon the lands. When a trust of lands is created, the conscience of the trustee is affected; the creditor is put under his care, and it becomes the special duty of the trustee to look after him; and it has always been the rule of

Charge of debts distinguished from trust.

In a trust for payment of debts, lapse of time no bar.

<sup>1</sup> Pardo v. Bingham, L. R. 6 Eq. 485.

<sup>2</sup> Bruere v. Pemberton, cited as Anon. 18 Ves. 258; Owens v. Dickenson, Cr. & Ph. 48, 53; Murray v. Barlee, 3 My. & K. 209; *In re* Poole's Case, Thompson v. Bennett, L. R. 6 Ch. Div. 739.

<sup>3</sup> 3 & 4 Will. IV., c. 104.

<sup>4</sup> Harmood v. Oglander, 8 Ves. 124.

In a charge, creditors may be barred by lapse of time.

equity, and under the Judicature Act, 1873, sect. 25, sub-sect. 2, it is now a rule in all the courts, that as between an express trustee and his *cestui que trust*, no length of time is a bar.<sup>1</sup> But if the creditors have merely a charge upon the lands in their favor, they must look after themselves, for otherwise they will be barred after twenty years by the statute of limitations, 3 & 4 Will. IV., c. 27, s. 40.<sup>2</sup> But note, that if a testator bequeath his personal estate upon an express trust for the payment of his debts, the statutes of limitation still run against the creditors,—the reason being that such a bequest is, in effect, inoperative, seeing that the personal estate is, by law, primarily liable to the payment of the debts, and the testator, by professing to create a trust of it for that purpose, does nothing, or merely does that which the law has already done.<sup>3</sup> But note also, that a trust of *personal* estate even, for payment of debts, when the trust is created by *deed* (and not by *will*), is an effectual express trust, against which length of time is no bar.

What amounts to a charge of debts.

In order to prevent the injustice, which, previously to the late enactment, many times resulted to creditors, in consequence of a testator not having charged his debts upon his real estate, courts of equity, by straining a little the ordinary rules of construction, laid it down as a rule in this class of cases, that a mere general direction by a testator, that his debts should be paid, effectually charged

A general direction by testator for payment of his debts.

<sup>1</sup> Hughes v. Wynne, Turn. & Russ. 309; Townshend v. Townshend, 1 Cox, 29, 34; 3 & 4 Will. IV., c. 27, s. 25; 36 & 37 Vict., c. 66, s. 25, § 2.

<sup>2</sup> Jacquet v. Jacquet, 27 Beav. 332; but see Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57, s. 8), reducing the 20 years to 12.

<sup>3</sup> Scott v. Jones, 4 Cl. & Fin. 382; and see 3 & 4 Will. IV., c. 27, s. 40.

them on his real estate: and such rule of construction is still in practice in the courts, notwithstanding that the original occasion for it has either ceased altogether or been minimized. Thus, in *Legh v. Earl of Warrington*,<sup>1</sup> a testator commenced a will thus:—"As to my worldly estate, which it hath pleased God to bestow upon me, I give and dispose thereof in manner following: (that is to say), *Imprimis*, I will that all my debts which I shall owe at the time of my decease, be discharged and paid out of my estate;" and he then disposed of his real and personal estate, charging the former with an annuity. It was contended that these were merely introductory words, and did not indicate an intention to charge the real estate generally with the debts. But the House of Lords, affirming a decree of Lord King, held the real estate to be charged with the debts. And it is not necessary that such expressions as "*Imprimis*" should be at the beginning of the will. "I do not think," observed Shadwell, V.-C., in *Graves v. Graves*,<sup>2</sup> "that the charge is made to rest on the mere circumstance that the testator has used the words, '*imprimis*,' or 'in the first place,' for if a testator directs his debts to be paid, is it not, in effect, a direction that his debts shall be paid in the first instance?"

There are, however, certain exceptions to the general rule, viz:—

1st. Where the testator, after a general direction for the payment of his debts, has specified a particular fund for the purpose; "because the charge by implication is controlled by the specific charge made in the subsequent part of the will."<sup>3</sup>

1. Where testator has specified a particular fund for payment of debts.

<sup>1</sup> 1 Bro. P. C. Toml. ed., 511.

<sup>2</sup> 8 Sim. 55.

<sup>3</sup> Thomas v. Britnell, 2 Ves. Sr. 313; Price v. North, 1 Ph. 85.

2. Where executors, not being also devisees, are directed to pay the debts.

2d. Where the debts are directed to be paid by the executors who are not at the same time devisees of the real estate;<sup>1</sup> for, in that case, it will be presumed that the debts are to be paid exclusively out of the assets which come to them as executors.

Debts to be paid out of rents and profits.

A direction to raise money for payment of debts out of rents and profits of real estate, will authorize the sale or mortgage of the estate for that purpose.<sup>2</sup>

Lien on land not affected by a charge of debts.

Where a person has a direct lien upon the lands as mortgagee or otherwise, his right of priority will not be affected by any such general charge of debts.<sup>3</sup>

Neither specialty nor simple contract debts are a lien on the lands.

Neither debts by specialty, in which the heirs are bound, nor simple contract debts, even since 3 & 4 Will. IV., c. 104, which made the land of a deceased debtor assets, constitute a lien or charge upon the land in the hand either of the debtor or of his heir or devisee. The latter may alienate the lands before any proceedings are taken by the creditors to make them liable, and in the hands of the alienee, whether upon an ordinary purchase or upon a settlement, even with notice that there are debts unpaid, the land is not liable, though the heir or devisee remains *personally* liable to the extent of the value of the land.<sup>4</sup>

[The doctrine of equitable assets is of little or no importance in the county as a head of chancery jurisprudence, owing to the fact that it has been adopted and incorporated into the statute law of

<sup>1</sup> Cook v. Dawson, 3 De G. F. & J. 127; Finch v. Hattersley, 3 Rus. 345, n.

<sup>2</sup> Bootle v. Blundell, 1 Mer. 232; Metcalfe v. Hutchinson, L. R. 1 Ch. Div. 591; *In re Brooke*, Brooke v. Rooke, L. R. 3 Ch. Div. 630.

<sup>3</sup> Child v. Stephens, 1 Vern. 101, 103.

<sup>4</sup> Morley v. Morley, 5 De G. M. & G. 610; Carter v. Saunders, 2 Drew. 248; Kinderley v. Jervis, 22 Beav. 1.

most of the States; in other words, that the debts of decedents are paid *pari passu*, subject to some few preferences which have been introduced by statute and which vary in the different States.<sup>1]</sup>

The maxim "equality is equity," is not extended to legatees jointly with creditors. Thus, although land may be devised in trust for, or charged with the payment of debts and legacies, the debts will in all cases have precedence of the legacies, on the ground that a man must first do what is just before he attempts what is generous. On the other hand, legatees and devisees, as being express objects of a testator's generosity or bounty are respectively preferred to the next of kin and to the heir-at-law of the testator; and among legatees, residuary legatees are considered the least objects of such express generosity, although it is otherwise with residuary devisees, for these latter rank on the same level as other devisees.<sup>2</sup>

From these and such like considerations, the courts have established in the administration of assets, the following order in the liability to debts of the different properties (but as between such properties themselves only) belonging to the testator at the time of his decease, that is to say,—

1. The general personal estate, not bequeathed at all or by way of residue only.
2. Real estate devised for the payment of debts.
3. Real estate descended.
4. Real estate devised specifically or by way of residue, and being at the same time charged with the payment of debts.

<sup>1</sup> [Bisph. Eq., § 534].

<sup>2</sup> Walker v. Meager, 2 P. W. 551; Kidney v. Coussmaker, 12 Ves. 154; Hooper v. Smart, L. R. 1 Ch. Div. 90; Roper v. Roper, L. R. 3 Ch. Div. 714.

5. General pecuniary legacies, including annuities, and including also demonstrative legacies which have become general.

6. Specific legacies (including demonstrative legacies that have remained demonstrative) and real estate devised specifically or by way of residue, and not being at the same time charged with debts.

7. Personalty or realty subject to a general power of appointment, and which power has been actually exercised by deed (in favor of volunteers) or by will.

8. Paraphernalia of widow.

1. The general personal estate,—primary liability of.

1. The general personal estate, not bequeathed at all, or by way of residue only, and which is in general legal assets, is first liable.<sup>1</sup> But, of course, the testator may have exonerated it from its primary liability, and such exoneration may be either express or implied. Thus, if the testator has appropriated any specific part of his personal estate for the payment of his debts, and has also disposed of his general residuary personal estate, the part so appropriated will be primarily liable to the payment of the debts in exoneration and exemption, so far, at least, of the general residuary estate. If, however, he has made no disposition of his general residuary personal estate, then, notwithstanding such an appropriation, the general residuary personal estate, thus remaining undisposed of, will still remain subject to its primary liability to pay the debts. It requires, in fact, very strong language on the part of the testator to exonerate his general personal estate

Question.—What exonerates the personalty.

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[<sup>1</sup> *Lupton v. Lupton*, 2 Johns. Ch. 614; *Clark v. Henshaw*, 30 Ind. 144. The only exception to these rules is said to be in South Carolina, where it is held that property, whether real or personal, which has been specifically set apart by the will for the payment of debts, must be first applied to that purpose. *Dunlap v. Dunlap*, 4 Dessau. 305; *Pinckney v. Pinckney*, 2 Rich. Eq. 235; *Bisph. Eq.* 346.]

from its primary liability to the payment of his debts. Of course, nothing that he can say can deprive his creditors of their legal rights to resort primarily to his personal estate; *but as between the several persons to whom his property may be bequeathed or devised*, who, therefore, take as volunteers under him, he may, if he pleases, vary the priorities; but to do this he must show an intention not only to charge his real estate with his debts, but also to exonerate his personal estate therefrom.

Thus neither a general charge of the debts upon the real estate, nor an express trust created by the testator for the payment of his debts out of his real estate, or any part thereof,<sup>1</sup> will be sufficient to exonerate the personal estate from its primary liability to pay them. Nor will it alter the case that the charge or trust for payment out of the real estate comprises also the testator's funeral and testamentary expenses,<sup>2</sup> though this circumstance is not without its weight, if there be in the will other indications of an intention to exonerate the personalty. If, therefore, the personal estate be simply given to some legatee, and more particularly if the articles given be specifically mentioned, the indication thus afforded of the testator's wish that the personalty shall come clear to the legatee, will, if coupled with an express trust for payment of the funeral and testamentary expenses out of the real estate, be sufficient to exonerate the personalty.<sup>3</sup> But if the personalty be simply given to the executor, or if the gift be merely of the residue of the personal estate, the personal estate will not be exempt.<sup>4</sup> In short,

*Answer.*—There must be both a discharge of the personalty and a charge of the realty.

<sup>1</sup> *Tower v. Rous*, 18 Ves. 132; *Collis v. Robins*, 1 De G. & Sm. 131.

<sup>2</sup> *Brydges v. Phillips*, 6 Ves. 570.

<sup>3</sup> *Greene v. Greene*, 4 Mad. 148; *Lance v. Aglionby*, 27 Beav. 65.

<sup>4</sup> *Aldridge v. Wallscourt*, 1 Ball. & B. 312.

an intention must appear to give the personal estate *as a specific legacy* to the legatee; and if this be the case, it will be exempt, and will be removed to that distant rank in point of liability in which all specific devises and bequests are held to stand.<sup>1</sup>

2. Lands expressly devised for payment of debts, equitable assets.

2. Lands devised to pay debts, and not merely devised charged with debts, are liable next after the personalty.<sup>2</sup> These are equitable assets, and are, therefore, applicable in payment of debts by specialty and simple contract *pari passu*.

3. Realty descended legal assets.

3. Real estates which have descended to the heir, but not charged with debts, are next liable.<sup>3</sup>

4. Realty devised charged with debts, equitable assets.

4. Real estates devised, specifically or by way of residue, and being at the same time charged with the payment of debts, are next liable, and, of course, *pro rata*.<sup>4</sup> These are equitable assets, and debts are payable out of them *pari passu*.

Heir taking a lapsed devise.

If the heir takes by reason of a lapse or other failure, land devised charged with debts, the land so charged is applicable for payment of debts in the same order as devised estates, and not till after the real estates, which had descended,<sup>5</sup> that is to say, it remains where it would have stood if it had not failed but taken effect, *i. e.*, in the 4th (and not in the 3rd) line in the order of liability.

<sup>1</sup> Wms. on Assets, 181.

<sup>2</sup> Harmood v. Oglander, 8 Ves. 125; Phillips v. Parry, 22 Beav. 279.

<sup>3</sup> Davies v. Topp, 1 Bro. C. C. 527; Manning v. Spooner, 3 Ves. 17; Milnes v. Slater, 8 Ves. 304; Wood v. Ordish, 3 Sm. & Giff. 125. [Com. v. Shelby, 13 S. & R. 348; Warley v. Warley, 1 Bailey (Eq.) 398.]

<sup>4</sup> Barnwell v. Lord Cawdor, 3 Mad. 453; Irvin v. Ironmonger, 2 Russ. & My. 531. [McFait's Appeal, 8 Pa. St. 290.]

<sup>5</sup> Wood v. Ordish, 3 Sm. & Giff. 125; Stead v. Hardaker, L. R. 15 Eq. 175. And see (as to lapsed personal estate), Trethewy v. Helyar, L. R. 4 Ch. Div. 53; Fenton v. Wills, L. R. 7 Ch. Div. 33. See also *In re Jones*, Jones v. Caless, 10 Ch. Div. 40.



After the passing of the Wills Act, the question <sup>A residuary devise is specific.</sup> arose whether a residuary devise was still to be deemed specific, at least for the purposes of settling the order of liability in the administration of the assets of a deceased person. This question was answered in the affirmative in the case of *Hensman v. Fryer*,<sup>1</sup> decided on appeal by Lord Chelmsford; and as Lord Chelmsford's decision, upon this point, has been since (after much professional and judicial conflict of opinion regarding it) approved and confirmed by Lord Cairns in the recent case of *Lancefield v. Iggulden*,<sup>2</sup> the specific character of the residuary devise is now concluded by authority, and reason must assent to the decision.

5. General pecuniary legacies are next liable, and <sup>5. General pecuniary legacies.</sup> of course, *pro rata*.<sup>3</sup>

6. Specific legacies<sup>4</sup> and real estates devised <sup>6. Specific legacies and devises pro rata.</sup> specifically, or by way of residue and not being at the same time charged with the payment of debts,<sup>5</sup> are next liable, and of course *pro rata*, to contribute to the payment of debts by specialty, in which the heirs are bound,<sup>6</sup> and also (it is conceived) to the payment of debts by simple contract and by specialty in which the heirs are not bound.<sup>7</sup>

In the above-mentioned case of *Hensman v. Fryer*, <sup>*Hensman v. Fryer*, explained.</sup> Lord Chelmsford, after deciding that a resi-

<sup>1</sup> L. R. 3 Ch. App. 420; *Gibbins v. Eyden*, L. R. 7 Eq. 371; 2 Jarm. on Wills, 589; but see *Lancefield v. Iggulden*, 22 W. R. 726.

<sup>2</sup> L. R. 10 Ch. App. 136.

<sup>3</sup> *Clifton v. Burt*, 1 P. W. 680; *Headley v. Readhead*, Coop. 50.

<sup>4</sup> *Fielding v. Preston*, 1 De G. & J. 438; *Evans v. Wyatt*, 31 Beav. 217.

<sup>5</sup> *Mirehouse v. Scaife*, 2 My. & Cr. 695; *Milnes v. Slater*, 8 Ves. 303.

<sup>6</sup> *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 655.

<sup>7</sup> *Collis v. Robins*, 1 De G. & Sm. 131.

duary devise was still specific, further held (but apparently only to do particular justice in the particular circumstances of that case), that pecuniary legatees were entitled to call on residuary devisees to contribute rateably to the payment of debts, which the general personal estate was insufficient to satisfy. But this part of that decision which appeared to overrule a long series of authorities, decided, as well by courts of appeal, as by courts of first instance,<sup>1</sup> has not been followed,<sup>2</sup> and is not to be considered as laying down any general rule upon the subject; on the contrary, in *Lancefield v. Iggulden*, *supra*, Lord Cairns applied the general rule, and ranked (as it was only consistent to rank) residuary devisees among specific devisees for all the purposes of administration, that is to say, in the 4th line of liability if charged with the payment of debts, and in the 6th line of liability if not so charged, keeping company in each case with lands specifically devised.

7. Property over which testator has exercised a general power of appointment.

7. Real or personal property over which the testator has a *general* power of appointment, if and so far as he has *actually* exercised that power,<sup>3</sup> whether by deed *in favor of volunteers*, or by will, is next applicable. In this case the property appointed will in equity form part of the appointor's assets, so as to be subject to the demands of his creditors in preference to the claims of his legatees or appointees.<sup>4</sup>

<sup>1</sup> 2 W. & T. 98; *Clifton v. Burt*, 1 P. Wms. 678; *Fielding v. Preston*, 1 De G. & Jo. 438.

<sup>2</sup> *Collins v. Lewis*, L. R. 8 Eq. 708; *Dugdale v. Dugdale*, L. R. 14 Eq. 235; and see *Tompkins v. Colthurst*, L. R. 1 Ch. Div. 626; *Farquharson v. Floyer*, L. R. 3 Ch. Div. 109.

<sup>3</sup> *Fleming v. Buchanan*, 3 De G. M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. & Giff. 305; *Pardo v. Bingham*, L. R. 6 Eq. 485.

<sup>4</sup> *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206; *Vaughan v. Vanderstegen*, 2 Drew. 165.

8. The paraphernalia of the testator's widow occupies the last line in the order of liability, she being preferred to all legatees and devisees, and ranking, in fact, in the order of preference, next after the creditors of the deceased—and that for the reason that her paraphernalia, although liable to her husband's debts, cannot be disposed away from her by his will alone.

The results of the chapter may be thus summed up in the words of a learned writer. “The order in which we have seen that the various portions of a testator's estate are applied for the payment of his debts, has been established out of a regard to the testator's intention. The general personal estate was long the only fund to which those creditors who had not specialties binding the heir could resort; and besides, cash, stock, and movables come first to hand, and are the most readily applicable, and are the funds out of which people in their lifetime usually pay their debts. Next after the general personal estates, any special fund set apart by the testator would naturally come. The heir not being a beneficiary within the testator's intention, lands descended to him would properly follow next in the order of application. But lands charged with the payments of debts would, of course, be applicable before legacies bequeathed, or property specifically given and not so charged. Again, there seems a more direct intention to benefit a specific devisee or legatee than to benefit a mere pecuniary legatee. Pecuniary legacies must therefore go unpaid rather than specific devises or bequests be touched. These, however, must be resorted to for the payment of debts as a last resource, whilst lands over which the testator has exercised a *general* power of appointment are, in favor of creditors, considered as supplementarily applicable after the whole of the testa-

The testator's intention is the guide.

Reasons why personalty is primarily liable.

Intention to benefit shown more clearly in a specific than in a general legacy.

Retainer by executor.

tor's own property has been exhausted.'"<sup>1</sup> And (it may be added) the paraphernalia come last of all. If from these various sources there is not enough to pay and satisfy all the debts, then the creditors are compelled to abate among themselves *pro rata*, and in a manner, therefore, to prey and feed upon each other for their own satisfaction *pro tanto*. But any creditor, who is at the same time executor of the deceased, may retain to himself his own debt in full,<sup>2</sup> at least out of the legal assets, and as against other creditors in equal degree, but subject to certain restrictions.<sup>3</sup>

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<sup>1</sup> Wms. Real Assets, 108.

<sup>2</sup> 2 Wms. Executors, 971 (6th ed.); *Richmond v. White*, 10 Ch. Div. 727, reversed, 12 Ch. Div. 361; *Talbot v. Frere*, 9 Ch. Div. 568.

<sup>3</sup> *Ibid*.

## CHAPTER XV.

## MARSHALLING ASSETS.

It must not be forgotten, that the order (stated The general principle of marshalling explained. and expounded in the preceeding chapter) in which the several funds liable to the payment of debts are to be applied, regulates the administration of the assets *only as between or among the testator's own representatives, devisees and legatees*, and does not affect the right of the creditors themselves to resort, in the first instance, to all or any of the funds to which their claims extend. It might have happened, therefore, in times preceding the Act, 3 & 4 Will. IV., c. 104, although it can hardly (if at all) happen now, that a creditor having a right to proceed against two or more funds proceeded against some fund which was the only resource of some other creditor, less amply provided for than himself. Equity would in such a case have held that the creditor having two funds should not, by resorting to the fund which was the only resource of another creditor, disappoint that other ; but would have permitted the latter to stand, to the extent of his disappointment, in the place of the more favoured creditor, against the other fund, to which the less favoured creditor had no direct access, the object of the court in so doing being, that all creditors should be satis-

fied, so far as, by any arrangement consistent with the nature of their several claims, the property which they ought to effect could be applied in satisfaction of such claims.<sup>1</sup>

Two varieties of marshalling.

It is proposed to examine the cases in which equity carries out this or an analogous principle—and hereunder :—

Firstly, Marshalling as between creditors; and,

Secondly, Marshalling as between the beneficiaries entitled under the will.

1. As between creditors. Under old law, simple contract creditors permitted to stand in shoes of specialty creditors as against the realty

Firstly, under the old law, before 3 & 4 Will. IV., c. 104, simple contract creditors had, as we have seen, no claim upon the real assets of a deceased person, unless these assets were charged with, or were devised for the payments of debts. In the absence of such charge or devise, specialty creditors, who might in the first instance resort to the personal estate, in priority to simple contract creditors, and also to the real assets, in exclusion of simple contract creditors, would be compelled in equity to resort for the satisfaction of their debts, in the first place, to the real assets, as far as they went, so as to leave the personalty for the simple contract creditors; or if the specialty creditors had already exhausted the personal assets in payment of their claims, the simple contract creditors would be put to stand in their place against the real assets, whether devised or descended, *as far as the specialty creditors might have exhausted the personal assets.*

Marshalling against a mortgagee who exhausts or diminishes the personalty.

In *Aldrich v. Cooper*,<sup>2</sup> decided before 3 & 4 Will. IV., c. 104, a mortgagee of freehold and copyhold estates, who was also a specialty creditor, having exhausted the personal assets, simple contract creditors were held entitled to stand in his place, against

<sup>1</sup> *Aldrich v. Cooper*, 2 Smith, L. C. 80. [*Alston v. Munford*, 1 Brock. 266.]

<sup>2</sup> 2 Smith L. C. 80.

both the freehold and the copyhold estates, *so far as the personal estate was taken away from them by such specialty creditor*. And in *Selby v. Selby*,<sup>1</sup> it was decided that if the vendor of an estate, the contract for which was not completed in the lifetime of the testator who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, *to the extent of his lien on the estate sold* as against the devisee of that estate.

Also, against an unpaid vendor, who does the like. \

Freehold and copyhold estates being now, under 3 & 4 Will. IV., c. 104, liable to simple contract debts, the court is no longer under any such necessity of resorting to the doctrine of marshalling to enforce their payment.<sup>2</sup> And the recent statute 32 & 33 Vict., c. 46, having abolished the priority of specialty over simple contract debts in the administration of the estates of all persons dying after the 1st of January, 1870, questions of marshalling *as between creditors* have now become of little practical importance,<sup>3</sup> [and for the same reason—the law having put all kinds of debts on the same footing—the necessity for marshalling assets has not often arisen in the United States.<sup>4</sup>]

Realty now assets for payment of all debts, 3 & 4 Will. IV., c. 104.

Priority of creditors abolished, 32 & 33 Vict., c. 46 and 38, & 39 Vict., c. 77, § 10.

Marshalling would not, unless founded on some equity, have been enforced as between persons, unless they were creditors of the same debtor, and had demands against funds the property of the same debtor. “It was never said,” observed Lord Eldon, “that if I have a demand against A. and B., a creditor of B. shall compel me to go against A., without more; \* \* \* but if I have a demand against both,

No marshalling except between creditors of the same person.

<sup>1</sup> 4 Russ. 363.

<sup>2</sup> *Cradock v. Piper*, 15 Sim. 301; *Gwynne v. Edwards*, 2 Russ. 289 n.

<sup>3</sup> See also 36 & 37 Vict., c. 66, s. 25, *supra*.

[<sup>4</sup> See *Torr's Estate*, 2 Rawle, 250.]

the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity, giving B. the right for his own sake to seek payment from A.''<sup>1</sup>

Marshalling of securities,—general rules regarding.

The court has applied the like principles to the marshalling of securities; but this subject is one of so difficult a character, and depends upon distinctions so minute, that it is hardly possible to express the law regarding it in anything like a brief and intelligible way. The following is an attempt to express the more salient points of the law:—

The general principle may be thus stated, adopting with some slight adaptation the words of Lord Hardwicke in *Lanoy v. Duke of Athole*,<sup>2</sup> viz:—If a person having two real estates, mortgages both estates to A., and afterwards mortgages one only of the estates to B., whether or not B. had notice of A.'s mortgage,<sup>3</sup> the court directs A. (but always without prejudice to A.) to realize his debt out of that estate which is *not* in mortgage to B., so as to leave the one estate which is in mortgage to B. to satisfy B. so far as it goes.

This general principle of marshalling is applicable also as against a surety, to whom (on payment by him of the debt) A. may have assigned his two securities.<sup>4</sup>

The principle is subject to the following restriction, viz., that the marshalling of securities is not enforceable by B. to the prejudice of C. (a third person).<sup>5</sup> The subject will be more fully discussed

<sup>1</sup> *Ex parte Kendall*, 17 Ves. 520.

<sup>2</sup> 2 Atk. 446.

<sup>3</sup> *Tidd v. Lister*, 10 Hare 157.

<sup>4</sup> *South v. Bloxam*, 2 Hem. & Mill. 457; *Robinson v. Gee*, 1 Ves. Sr. 252.

<sup>5</sup> *Averall v. Wade*, L. & G. t. Sugd. 252; *Barnes v. Racster*, 1 Yo. & Col. Ch. Ca. 401; *Thornycroft v. Crockett*, 2 H. L. Cas. 239.



in the chapter on Mortgages, and in the chapter on Suretyship, *infra*.

Secondly, it remains to consider the doctrine of marshalling as between the divers beneficiaries entitled under the will, and (in the case of partial intestacies) as between also the heir-at-law and the next of kin. In this group of cases, it is usually by reason of the disturbing action of the creditors of the deceased that the question of marshalling arises, although occasionally (as will be shown later on in this present chapter) it may arise from other causes. Now, where it arises from the disturbing action of creditors,—the general principle which runs through all the cases of marshalling as between beneficiaries may be arrived at in this way, viz.,—  
2. As between the beneficiaries entitled under the will.  
The general principle of marshalling,—how derived from the order of the liability of the divers properties.  
 Taking the various properties specified on p. 257, *supra*, in the order of their respective liabilities to the payment of debts in the administration of assets as shown on that page, and substituting in the same order the various persons to whom the various properties would go if there were no debts to pay, and to whom they do, in fact, go, so far as they are not exhausted by the payment of debts, we obtain the following list of the persons entitled under the will (and otherwise) to participate in the property of the deceased testator, that is to say,—

1. The next of kin or the residuary legatees ;
2. The heir-at law ;
3. The heir-at-law :
4. The charged devisees (specific and residuary) ;
5. The pecuniary legatees ;
6. The devisees (specific and residuary) and the specific legatees ;
7. The general appointees by deed or will ; and,
8. The widow.

Now, the general rule of marshalling is derived from the preceding list of beneficiaries in this way, and is to this effect, viz. :—

That if any beneficiary in the above list is disappointed of his benefit under the will through the creditor seizing upon (as he may) the fund intended for such disappointed person, then such person may recoup or compensate himself for that disappointment (to the extent thereof) by going against the fund or funds intended for (and in that way similarly disappointing in his turn) any one or more of the beneficiaries prior to himself in the above list; and such secondly disappointed person or persons may in his or their turn do the like against those prior to him or them, so that eventually the next of kin or residuary legatees (as the case may be) have to bear the disappointment without any means of redress; but nobody may go against any one posterior to himself on the list; and persons occupying the same rank in the list may have contribution (if not compensation) as against each other.

The general principle,—application of.

Widow's paraphernalia preferred to a general legacy.

We proceed to test this rule in its application to the decisions.

Although, with the exception of necessary wearing apparel,<sup>1</sup> a widow's paraphernalia are liable to her deceased husband's debts, she will be preferred to a general legatee, and be entitled therefor to marshal assets in all cases in which a general legatee would be entitled to do so.<sup>2</sup> And on principle it would seem to be settled also, that a widow, as to her paraphernalia, is to be deemed entitled to precedence also over specific legatees and devisees.<sup>3</sup> In fact, both principle and the weight of authority point to the conclusion that a widow, as to her paraphernalia, is entitled to rank next after the ordinary creditors.<sup>4</sup>

<sup>1</sup> Lord Townshend v. Windham, 2 Ves. Sr. 7.

<sup>2</sup> Tipping v. Tipping, 1 P. W. 730; Boynton v. Parkhurst, 1 Bro. C. C. 576.

<sup>3</sup> Lord Townshend v. Windham, 2 Ves. Sr. 7; Probert v. Clifford, Amb. 6; Graham v. Londonderry, 3 Atk. 305.

<sup>4</sup> Wms. Real Assets, 118.

If the heir-at-law has paid any debts, which ought to have been paid, first, out of the general personal estate, secondly, out of lands subject to a trust or power for their payment, he will have a right to have the assets marshalled in his favor, as against those two funds, but not to the prejudice of pecuniary legatees, still less to the disappointment of specific gifts; for the heir is not a devisee, while the general or specific legatees take by the special bounty of the testator.<sup>1</sup>

Right of heir as to descended land.

A devisee of lands charged with the payment of debts paying any debts whilst any of the previously liable property remains unexhausted, will have a right to have the assets marshalled in his favor, and to stand in the place of the creditor so far as regards, 1st, the general personal estate; 2d, land subject to a trust or power for raising debts; and, 3d, lands descended to the heir.<sup>2</sup>

Devisee of lands charged with debts.

Since the decision of Lord Chelmsford in *Hensman v. Fryer*,<sup>3</sup> as affirmed and applied in *Lancefield v. Iggulden*,<sup>4</sup> residuary devisees stand in the same position as specific legatees or devisees.

Position of a residuary devisee.

Pecuniary legatees, if the personal estate out of which they are to be paid has been exhausted by creditors are entitled to be paid—

Against whom pecuniary legatees may marshal.

(a.) Out of lands which descend to the heirs.<sup>5</sup>

(b.) Out of lands devised simply subject to debts.<sup>6</sup>

(c.) Out of lands subject to a mortgage, to the extent to which the mortgagee may have disappointed them by resorting first to the personal estate.<sup>7</sup>

<sup>1</sup> Hanby v. Roberts, Amb. 128.

<sup>2</sup> Harmood v. Oglander, 8 Ves. 106.

<sup>3</sup> L. R. 3 Ch. App. 420; Gibbins v. Eyden, L. R. 7 Eq. 371.

<sup>4</sup> L. R. 10 Ch. App. 136; and see Tomkins v. Colthurst, L. R. 1 Ch. Div. 626, Farquharson v. Floyer, L. R. 3 Ch. Div. 109.

<sup>5</sup> Sproule v. Prior, 8 Sim. 189.

<sup>6</sup> Rickard v. Barrett, 3 K. & J. 289.

<sup>7</sup> Johnson v. Child, 4 Hare, 87; and see Lutkins v. Leigh, Cas. t. Talb. 53 (where the creditors were mortgagees), and

But pecuniary legatees have no right to marshal against lands comprised in a residuary devise any more than against specific legatees and devisees,<sup>1</sup> unless such residuary devise should be charged with the payment of debts.

Specific legatees  
and devisees.

In this view of the law, specific legatees and devisees (including residuary devisees) have the right, if called on to pay any debts of their testator, to have the whole of his other property real or personal marshalled in their favor, so as to throw the debts as far as possible on the other assets, which are antecedently liable.

Contribute ratably,  
*inter se*.

A specific devisee (including a residuary devisee) and a specific legatee contribute *pro rata* to satisfy the debts of the testator, which the property antecedently liable has failed to satisfy, for the testator's intention of bounty is equal in all these cases.<sup>2</sup>

If specific devisee  
or legatee take  
subject to a  
burden, he can  
not compel the  
others of the  
same class to  
contribute.

If, however, the subject of any specific devise (including a residuary devise) or specific bequest is liable to any particular burden of its own, the devisee or legatee must bear it alone, and cannot call the other specific legatees or the other devisees to his aid. Thus, the devisee of land bought by the testator but not paid for, cannot call on the other devisees or on the specific legatees to pay a proportion of the purchase-money to which his land is subject by reason of the vendor's lien, although prior to 30 & 31 Vict., c. 69, he might have claimed to have his land exonerated at the expense of every one else taking property antecedently liable.<sup>3</sup>

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Lord Lilford v. Powys-Keck, L. R. 1 Eq. 347 (where the creditors were unpaid vendors). And compare Wythe v. Henniker, 2 My. & K. 735.

<sup>1</sup> Lancefield v. Iggulden, L. R. 10 Ch. App. 136, showing the true general application of the decision in Hensman v. Fryer, L. R. 3 Ch. App. 420.

<sup>2</sup> Tombs v. Roch, 2 Coll. 490; as explained in Lancefield v. Iggulden, *supra*.

<sup>3</sup> Emuss v. Smith, 2 De G. & Sm. 722.

There is yet another case in which equity, out of regard to the testator's intention, marshals assets in favor of legatees. This case, however, does not depend on the same principle as those we have already mentioned; it does not arise in consequence of the disturbing action of any creditor who has taken some part of the assets out of their usual order, but simply from the presumption that when a testator leaves legacies, he wishes that if possible they should all be paid. To understand this branch of the subject, the reader must bear in mind that *even to the present day legacies are not payable out of real estate UNLESS the testator has charged his real estate with their payment*,<sup>1</sup> there never having been any statute passed to do for legacies what the statute 3 & 4 Will. IV., c. 104, has done for simple contract debts. If, therefore, a testator should leave certain legacies payable only out of his personal estate, and certain others which he has charged on his real estate, in aid of his personalty, and the personalty should not be sufficient to pay the whole, equity will marshal these legacies, so as to throw those charged on the real estate entirely on that estate, in order to leave more of the personalty applicable to the payment of the other legacies.<sup>2</sup>

But where the charge of a legacy upon real estate fails to affect it, in consequence of an event happening subsequently to the death of the testator, as the death of the legatee before the time of payment, the court will not marshal assets so as to turn such legacy upon the personal estate, in which case it

Marshalling between legatees where certain legacies are charged on real estate.

Where a legacy charged on real estate fails, it will not be treated as if it were not so charged, so as to be made transmissible.

<sup>1</sup> As to what amounts to an implied charge of legacies upon land, see *Greville v. Browne*, 7 H. L. Ca. 789; and for the extent of such implied charge, see *Gainsford v. Dunn*, L. R. 17 Eq. 405, *Bray v. Stevens*, 12 Ch. Div. 162, *Bailey v. Bailey*, Id. 268.

<sup>2</sup> *Bonner v. Bonner*, 13 Ves. 379; *Scales v. Collins*, 9 Hare, 656; *Wms. Real Assets*, 115.

would be vested and transmissible, whereas, as against the real estate, it would sink by the death of the legatee.<sup>1</sup>

Assets not marshalled in favor of charities.

Assets are never marshalled in favor of legacies given to charities, upon the ground that a court of equity is not warranted in setting up a rule of equity contrary to the common rules of the court merely to support a bequest which is contrary to law. If, therefore, a testator should bequeath to a charity a legacy payable out of the produce of his real and personal estate,<sup>2</sup> or a simple legacy without expressly charging it on that part of his personal estate which he may lawfully bequeath to charitable uses, the legacy will fail by law in the proportion which the real estate and personalty in the one case, or such personalty in the other, may bear to the whole fund out of which the legacy was made payable;<sup>3</sup> or, as Lord Cottenham has expressed himself in *Williams v. Kershaw*:<sup>4</sup> "The rule of the court adopted in all such cases is, to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as would in that way be paid out of the prohibited fund." But when it is said that the court will not marshal legacies in favor of charities, it is meant that the court will not do so when the will is silent; because if (as is usually the case) the will expressly directs that the legacies shall be marshalled in favor of the

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<sup>1</sup> *Prowse v. Abingdon*, 1 Atk. 482; *Pearce v. Loman*, 3 Ves. 135.

<sup>2</sup> *Currie v. Pye*, 17 Ves. 462.

<sup>3</sup> *Robinson v. Geldard*, 3 Mac. & G. 735; *Fourdrin v. Gowdey*, 3 My. & K. 397; *Johnson v. Lord Harrowby*, Johns. 425; *Hobson v. Blackburn*, 1 Keen 273.

<sup>4</sup> 1 Keen, 275 n.; and see *Blann v. Bell*, 7 Ch. Div. 382.

charities, then the court is ready to carry out that direction, and it does so with a liberal hand.<sup>1</sup>

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<sup>1</sup> *Miles v. Harrison*, L. R. 9 Ch. App. 316; *Att.-Gen. v. Lord Mountmorris*, 1 Dick. 379; *Luckraft v. Pridham*, W. N. 1879, p. 94.

## CHAPTER XVI.

## MORTGAGES.

Definition of mortgage.

Mortgage at common law.

An estate upon a condition.

A legal mortgage may be defined to be a debt by speciality, secured by a pledge of lands or other property, not being (like pew-rents) unmortgageable,<sup>1</sup> of which the legal ownership is vested in the creditor, but of which in equity the debtor, and those claiming under him, remain for the time the actual owners. It is, therefore, necessary, first, to show what is the effect of a mortgage at common law, and then to show how equity has modified or altered the common law to suit the ends of practical justice. At law, the ordinary mortgage, or *mortuum vadium*, as it was called, was strictly an estate upon condition; that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment, or in a deed of defeasance executed at the same time, by which it was provided that on payment by the mortgagor, or feoffor, of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition. If the

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<sup>1</sup> *Ex parte Arrowsmith, in re Leveson*, 3 Ch. Div. 96.



condition was performed, the feoffor re-entered and was in possession of his old estate. If the condition was broken the feoffee's estate became absolute and indefeasible, and all the legal consequences followed, as though he had been absolute unconditional owner from the time of the feoffment.<sup>1</sup>

Forfeiture at law  
on condition  
broken.

Happily, a jurisdiction arose, under which the harshness of the common law was softened without any actual interference with its principles, and a system was established, at once consistent with the security of the creditor, and a due regard for the interests of the debtor.<sup>2</sup> Our courts of equity, borrowing the doctrines of the civil law, did not indeed attempt to alter the legal effect of the forfeiture at common law; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain as owner for his own benefit what was intended as a mere pledge, and they adjudged that a breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgager had an "equity to redeem," on payment, within reasonable time, of principle interest, and costs, notwithstanding the forfeiture at law. Against the introduction of this novelty the common law judges strenuously opposed themselves, and though ultimately defeated by the increasing power of equity, they, nevertheless, in their own courts, still adhered to the rigid doctrine of forfeiture, and in the result, the law of mortgage fell almost entirely within the jurisdiction of equity.<sup>3</sup>

Interference of  
equity.

Equity operated  
on the conscience  
of the mortgagee.  
Mortgage held  
a mere pledge.

Mortgagor's  
equity to redeem  
notwithstanding  
forfeiture at law.

<sup>1</sup> Coote, 6.

<sup>2</sup> Coote 9.

<sup>3</sup> Coote, 10.

[The subject of mortgages is, in the United States at least, and at the present time, hardly atopic (except historically) of a text book on equity. The courts of law now recognize all those rights of the mortgagor which in former times could only be protected by the court of Chancery. "The case of mortgages" says Kent, "is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which these principles have received by their adoption in courts of law."<sup>1</sup>]

Mortgages an exception to the maxim, *modus et conventio vincunt legem*.

Debtor cannot at time of loan part with his right to redeem.

"Once a mortgage always a mortgage."

No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion, and it was a bold but a necessary decision of equity that the maxim of law, *modus et conventio vincunt legem*, was inapplicable—that the debtor could not, even by the most solemn engagements entered into *at the time of the loan*, preclude himself from his right to redeem. The courts, looking always at the intent, rather than at the form of things, disregarded all the defences by which the creditor surrounded himself, and laid down as a plain and invariable rule,<sup>2</sup> that it was inequitable that the creditor should obtain a collateral or additional advantage through the necessities of his debtor, beyond the payment of principal, interest, and costs,<sup>3</sup> and they established as a principle not to be departed from, that "once a mortgage always a mortgage;" that an estate could not at one time be a mortgage, and at an other time cease to be so, *by one and the same deed*; and that

<sup>1</sup> 4 Kent, Com. 158.

<sup>2</sup> Bonham v. Newcomb, 2 Vent. 364; Howard v. Harris, 1 Vern. 19.

<sup>3</sup> Chambers v. Goldwin, 9 Ves. 254; Leith v. Irvine, 1 My. & K. 277; Broad v. Selfe, 11 W. R. 1036.

whatever clause or covenant there might be in a conveyance, yet, if upon the whole it appeared to have been the intention of the parties that such conveyance should only be a mortgage, or should only pass an estate redeemable, a court of equity would always construe it so.<sup>1</sup> These rules, however, did not prevent a mortgagee agreeing with the mortgagor, for a preference or right of preemption in case of a sale;<sup>2</sup> and any other agreements between mortgagor and mortgagee (provided they did not exclude the equity of redemption) were and are good, *e. g.* an agreement not to call in the principal moneys, so long as the interest is paid.<sup>3</sup>

Right of pre-emption in mortgage.

And the rule regarding mortgages must also be distinguished from the rule governing a class of cases where there is *ab initio* an absolute *bona fide* sale and conveyance with a collateral agreement for re-purchase by the mortgagor, or repayment of the purchase-money within a stipulated time;<sup>4</sup> and such collateral agreement may be either introduced into the agreement for sale at the time, or may be made at a subsequent period. Whether a given transaction is a mortgage properly so called, or is a sale with the option of re-purchase, depends on the special circumstances of each case; and parol evidence will always be admitted to show, that what appears on the face of the deed to be an absolute conveyance was intended to be a conveyance by way of mortgage only.<sup>5</sup> “If the money paid by the

Conveyance with option of re-purchase in mortgagor.

Circumstances distinguishing a mortgage from a sale with right of re-purchase.

<sup>1</sup> Coote, 11; Jennings v. Ward, 2 Vern. 520. [Pritchard v. Elton, 38 Com. 434; McNees v. Swaney, 50 Mo. 39.]

<sup>2</sup> Orby v. Trigg 9 Mod. 2; Cookson v. Cookson, 8 Sim. 529.

<sup>3</sup> Keene v. Biscoe, 8 Ch. Div. 201.

<sup>4</sup> Alderson v. White, 2 De G. and J. 97; Birmingham Canal Co. v. Cartwright, 11 Ch. Div. 421.

<sup>5</sup> Maxwell v. Montacute, Prec. Ch. 526; Barnhart v. Green-shields, 9 Moo. P. C. C. 18; Douglas v. Calverwell, 3 Giff.

Effects of this distinction.

In a sale with right of re-purchase, time is strictly to be observed.

In a sale with right of re-purchase, if purchaser die seized, money goes to real representative.

Other forms of securities,—

grantee would be a grossly inadequate price for the absolute purchase of the estate ; if he was not let into immediate possession of the estate ; if he accounted for the rents to the grantor, and only retained an amount equivalent to the interest ; or if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered as evidence, showing with more or less cogency that the conveyance was only intended as a security.’’<sup>1</sup> And it must be remembered, that the difference between a transaction by way of sale with a right of re-purchase, and a mortgage, is very important with reference to the consequences of each. Whereas, in a mortgage, even after forfeiture at law, the mortgagor has his right of redemption in equity, in the case of a sale with the right of re-purchase, the time limited ought precisely to be observed, and there is no principle on which the court can in the latter case relieve, if the time is not exactly observed.<sup>2</sup> And there is also this further important difference, viz.:—that in the case of a sale, with an option to re-purchase, if the purchaser die seized, and *then* the right to re-purchase is exercised, the money goes to his real representative, and not as in case of a mortgage to his personal representatives.<sup>3</sup>

Besides these, there are several other species of securities for money which do not take the form of an ordinary mortgage. Thus,

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251. [Villa v. Rodueguez, 12 Wall. 323; Wing v. Cooper, 37 Vt. 179.]

<sup>1</sup> Powell on Mortgages, by Coventry, 125 a.; Brooke v. Garrod, 3 K. & J. 608, 2 De G. & J. 62; Williams v. Owen, 5 My. & Cr. 303.

<sup>2</sup> Barrell v. Sabine, 1 Vern. 268.

<sup>3</sup> Thornbrough v. Baker, 2 Smith L. C. 1046; St. John v. Wareham, cited 3 Swanst. 631.

1. The owner of an estate may, in consideration of money lent, convey it to the lender, with a condition that as soon as he, the lender, shall have repaid himself out of the rents and profits of the land the principal and interest of the loan, the debtor may re-enter. This is said to have been called a *vivum vadium*, because as the pledge itself worked off the debt it might be deemed to possess a sort of vitality. It seems now to have entirely ceased.<sup>1</sup>

2. The *mortuum vadium*, on the other hand, was of a very different character. According to Glanville,<sup>2</sup> the *mortuum vadium* was a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which time he received the rents without account, so that the estate was unprofitable or dead to the mortgagor in the meantime, the original debt remaining undiminished by the reception by the mortgagee of the rents and profits; in other words, the pledge in this case did not of itself work off the debt, but was in a manner dead. However, there was the like advantage, in one respect, to the debtor in this form of mortgage as in the *vivum vadium*, viz., that the estate was never lost,<sup>3</sup> but remained redeemable upon satisfaction of principal and interest at any time, however distant.

3. This *mortuum vadium* closely resembled the form of mortgage called a Welsh mortgage, in which the rents and profits are received by the mortgagee as an equivalent for the interest, and the principal remains undiminished.<sup>4</sup> In a Welsh mortgage there is no contract express or implied between

<sup>1.</sup> *Vivum vadium.*  
Lender to pay  
himself from  
rents and profits.

<sup>2.</sup> *Mortuum vadium.*  
Creditor took  
rents and profits  
without account.

Estate never lost.

<sup>3.</sup> Welsh mortgage.

Mortgagor may  
redeem at any  
time.

<sup>1</sup> Coote, 4.

<sup>2</sup> Lib. 10, c. 6.

<sup>3</sup> Coote, 5.

<sup>4</sup> Coote, 4.

the parties for the repayment of the debt at a given time; and though the mortgagee cannot foreclose or sue for the money, the mortgagor or his heirs may redeem at any time.<sup>1</sup>

Modern mortgage.

There is no trace of the period when the ancient *mortuum vadium* fell into disuse. In its stead arose the *mortuum vadium* of modern times or mortgage so well known at common law, which has already been described as an estate upon condition.<sup>2</sup> In this modern form of mortgage, when the mortgagee is in possession, he is accountable in equity for the rents and profits, and by means thereof he in effect works off the debt, as in the *vivum vadium*; but differently from the *vivum vadium*, the modern mortgage may from various causes (as we shall see) become irredeemable.

The nature of an equity of redemption,—it is an estate in the land over which the mortgagor has full power, subject to the incumbrance.

In early times, it was said that an equity of redemption was a mere *right*; but in *Casborne v. Scarfe*,<sup>3</sup> Lord Hardwicke laid it down that this equity was an estate in the land, and that the mortgagor was entitled to such estate as the real owner of the land, for the land was considered in equity only as a pledge or security for the money. It follows, therefore, that the person entitled to the equity of redemption, being considered in equity the real owner of the land, may exercise all such rights and acts of ownership over the unincumbered land as he might have exercised over the incumbered, subject, of course, to the rights of the mortgagee or incumbrancer. The mortgagor therefore might settle, or devise, or mortgage the land subject to the mortgagee's incumbrance.<sup>4</sup>

<sup>1</sup> *Howell v. Price*, Prec. Ch. 423, 477; and see 1 Ves. Sr. 405.

<sup>2</sup> Coote, 5; Litt. sec. 322.

<sup>3</sup> 2 Smith L. C. 1035; 1 Atk. 603.

<sup>4</sup> *Casborne v. Scarfe*, 1 Atk. 603.

[This view of the equity of redemption has been particularly observed in the United States where a mortgage is looked upon as a mere security for the debt, and the title is considered for most purposes as remaining in the mortgagor.<sup>1</sup> In some states indeed the mortgage passes no legal title whatever to the mortgagee until foreclosure takes place,<sup>2</sup> while in others the common law doctrine that the legal title passes to the mortgagee is adhered to subject as already stated to the equitable doctrine that this passage of the legal title is merely by way of security for the debt and that for all other purposes the mortgagor is regarded as the owner.<sup>3</sup> In some states the subject is regarded by statute''<sup>4</sup>]

And from the principle that an equity of redemption is an estate, it follows also that its line of devolution must in the course of descent be governed, as the land itself would have been, by the general law, or by the *lex loci*.

The equity of redemption being an estate in land, persons entitled to certain interests in that equity are entitled before foreclosure to come into a court of equity and to redeem.<sup>5</sup> As,—

(a.) The heir.<sup>6</sup>

(b.) The devisee of the equity of redemption.<sup>7</sup>

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<sup>1</sup> [Timms v. Shannon, 19 Md. 296; Glass v. Ellison, 9 N. H. 69; Catlin v. Henton, 9 Wis. 476.]

<sup>2</sup> Witherell v. Wiberg, 4 Saw. 235; McMillan v. Richards, 9 Cal. 409 and cases cited Bisph. Eq. 151.

<sup>3</sup> [Duval v. McLoskey, 1 Ala. 708; Knox v. Easton, 38 Ala. 345 and cases cited.]

<sup>4</sup> Bisph. Eq. § 151.

<sup>5</sup> 2 Sp. 660-663.

<sup>6</sup> Pym v. Bowreman, 2 Swanst. 241 n. [Smith v. Manning, 9 Mass. 422.]

<sup>7</sup> Lewis v. Nangle, 2 Ves. Sr. 431.

Devolution of equity of redemption same as of the land.

Who may redeem.

(*c.*) A tenant for life, a remainder-man, a reversioner, a dowress, a jointress, a tenant by the curtesy.<sup>1</sup>

(*d.*) An assignee or grantee.<sup>2</sup>

(*e.*) A subsequent mortgagee.<sup>3</sup>

(*f.*) A judgment creditor.<sup>4</sup>

(*g.*) The crown, or the lord on a forfeiture.<sup>5</sup>

(*h.*) A volunteer, although claiming under a deed fraudulent and void, under 27 Eliz., c. 4.<sup>6</sup>

N. B.—That one of several co-mortgagees can sue the mortgagor for redemption, making the other mortgagees co-defendants, when they refuse to be co-plaintiffs.<sup>7</sup>

Successive redemptions,—  
order of, and  
general principle  
regarding.

Every person who has a right to redeem the mortgage may redeem any prior incumbrancer on payment of principal, interest, and costs<sup>8</sup> due to him; the redeeming party being also liable to be redeemed by those below him, who are all liable successively to be redeemed by the mortgagor;<sup>9</sup> and the rule or practice is in a bill or action of foreclosure to offer to redeem all incumbrances prior in date to the plaintiff, and to claim to foreclose (if necessary) all incumbrances posterior in date to the plaintiff, unless these latter, or some or one of them, should re-

<sup>1</sup> 2 Smith L. C. 1078. [Lamson v. Drake, 105 Mass. 504; Arthur v. Franklin, 16 Ohio St. 193.]

<sup>2</sup> Anon. 3 Atk. 314. [Beach v. Cook, 28 N. Y. 508.]

<sup>3</sup> Fell v. Brown, 2 Bro. C. C. 278. [Scott v. Henry, 13 Ark. 112; Hodgen v. Guttery, 58 Ill. 431.]

<sup>4</sup> Stonehewer v. Thompson, 2 Atk. 440; Beckett v. Buckley, L. R. 17 Eq. 435; Anglo-Italian Bank v. Davies, 9 Ch. Div. 275; Bryant v. Bull, 10 Ch. Div. 153. [Bigelow v. Wilson, 1 Pick. 485; Bank v. Rosevelt, 9 Cow. 419.]

<sup>5</sup> Lovel's Case, 1 Eden. 210; Downe v. Morris, 3 Hare, 393.

<sup>6</sup> Rand v. Cartwright, 1 Ch. Ga. 59.

<sup>7</sup> Luck v. South Kensington Hotel Co., 7 Ch. Div. 739; 11 Ch. Div. 121.

<sup>8</sup> *Ex parte* Carr, *in re* Hofman. 11 Ch. Div. 62; Sheffield v. Eden, 10 Ch. Div. 291.

<sup>9</sup> 2 Sp. 665.



deem the plaintiff.<sup>1</sup> This rule is familiarly expressed in the phrase, "*Redeem up, foreclose down.*" The arrears of interest recoverable upon a redemption or foreclosure are usually six years only,<sup>2</sup> but are occasionally the entire arrears.<sup>3</sup> An auctioneer-mortgagee may be entitled to add his commission, that not being a secret profit.<sup>4</sup>

A person cannot redeem before the time appointed Time to redeem. in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that time;<sup>5</sup> and if the mortgagee should, as a matter of indulgence, consent to accept payment before the time appointed, he is entitled to the full amount of interest up to that time.

Previous to the Statute of Limitations, 3 & 4 Statute of Limitations. Old law, 21 Jac. I., c. 16. Will. IV., c. 27 [which in England fixes the right of redemption at twenty years] the rule established regarding possession by mortgagees was, as stated by Lord Hardwicke, analogous to the old Statute of Limitations, 21 Jac. I., c. 16, viz., "that after twenty years' possession by the mortgagee he should not be disturbed".<sup>6</sup> Where, however, the mortgagor was prevented from asserting his claim by reason of certain impediments, mentioned as exceptions in the stat. 21 Jac. I., c. 16, viz., imprisonment, infancy, coverture, &c., in all such cases, by analogy to the statute, equity allowed ten years after the removal of the impediment.<sup>7</sup> Also, any slight acknowledgment by the mortgage, of the existence of the equity

<sup>1</sup> *Beevor v. Luck*, L. R. 4 Eq. 537; *Bradley v. Riches*, 9 Ch. Div. 189.

<sup>2</sup> 3 & 4 Will. IV., c. 27, s. 42.

<sup>3</sup> *Smith v. Hill*, 9 Ch. Div. 143.

<sup>4</sup> *Miller v. Beal*, W. N. 1879, p. 36.

<sup>5</sup> *Brown v. Cole*, 14 Sim. 427.

<sup>6</sup> *Anon.* 3 Atk. 313.

<sup>7</sup> *Beckford v. Wade*, 17 Ves. 99.

of redemption would have taken the case out of the analogy of the statute.<sup>1</sup>

Mortgagor in possession not accountable for rents and profits.

A mortgagor, while he is in possession, is not bound to account for the rents and profits arising or occurring while in possession, even although the security should prove insufficient;<sup>2</sup> in fact, he is not the bailiff or agent of the mortgagee.

Restrained from waste if security be insufficient.

But, although the mortgagor remains thus, the actual owner of the land until foreclosure, still equity, regarding the land, with all its produce, as a security for the mortgage debt, will restrict the mortgagor's right of ownership within certain bounds, so that his ownership may not operate to the detriment or injury of the mortgagee. Hence equity will, on a bill filed by the mortgagee, grant an injunction against the mortgagor's waste, *e. g.*, against the felling of timber by the mortgagor; but in order to grant the injunction in such a case, the court must first be satisfied that the security is insufficient.<sup>3</sup> Neither will equity interpose its authority to obstruct the mortgagee from evicting the mortgagor from the possession, but will consider the latter as being for such purpose a mere tenant at will.<sup>4</sup> Occasionally the mortgagee makes a redemise of the mortgaged premises to the mortgagor; but more usually the mortgagor simply expresses that he attorns and becomes tenant to the mortgagee at a specified rent.<sup>5</sup> Further, and as a further consequence of the mortgagor being for the aforesaid purpose

Mortgagor tenant at will to mortgagee. Mortgagor cannot make

only a tenant at will, it follows that the mortgagor cannot make a valid lease binding on the

<sup>1</sup> *Smart v. Hunt*, 4 Ves. 478 n.

<sup>2</sup> *Ex parte Wilson*, 2 Ves. & Bea. 252. [*Galveston R. Co. v. Cowdry*, 11 Wall. 489; *Gilman v. Bridge Co.* 4 Otto, 800.]

<sup>3</sup> *Farrant v. Lovell*, 3 Atk. 723; *King v. Smith*, 2 Hare, 239; *Russ v. Mills*, 7 Gr. 145.

<sup>4</sup> *Cholmonedley v. Clinton*, 2 Mer. 359.

<sup>5</sup> *Ex parte Williams*, 7 Ch. Div. 138; *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335.

mortgagee, and if he should attempt to make such a lease, the mortgagee may eject his lessee without notice.<sup>1</sup> The consequence of this rule is, that in practice both mortgagor and mortgagee should combine in making the lease, wherever, at least (as in the case of mines), expense is to be incurred by the lessee, or there is a reasonable probability of the mortgagee proceeding to eviction.

The mortgagee, by virtue of his mortgage, becomes the legal owner of the land, and consequently entitled at law to immediate possession, or to the receipt of the rent, if the land be in lease.<sup>2</sup>

The mortgagee is entitled, out of the profits, to repay himself all the necessary expenses attending the collection of the rents,<sup>3</sup> and he may stipulate with the mortgagor for the appointment of a receiver to be paid by the mortgagor;<sup>4</sup> and under the statute 23 & 24 Vict., c. 145, a power to require the appointment of a receiver is now made an incident in every mortgage of lands, unless the mortgage deed expressly exclude such power. But courts of equity, fearful of opening a door to fraud, have imposed a restriction on the mortgagee, that he shall not be permitted to make any charge on the estate for his own personal trouble;<sup>5</sup> nor appoint himself a receiver of the estate, although under an express agreement with the mortgagor for that purpose,<sup>6</sup> for he is entitled to no benefit beyond his principal, interest, and costs.

It is the duty of the mortgagee in possession to keep the premises in necessary repair. He will be

<sup>1</sup> *Keech v. Hall*, Doug. 22.

<sup>2</sup> *Coote*, 339.

<sup>3</sup> *Godfrey v. Watson*, 3 Atk. 518.

<sup>4</sup> *Davis v. Dendy*, 3 Mad. 170.

<sup>5</sup> *Godfrey v. Watson*, 3 Atk. 518.

<sup>6</sup> *French v. Barron*, 2 Atk. 120.

necessary repair  
with surplus  
rents.

entitled to all his lawful expenses attending the renewal of leases, or incurred in maintaining the title.<sup>1</sup> But a mortgagee is not bound to lay out money on the estate, except for necessary repairs, and that only to the amount of the surplus rents,<sup>2</sup> nor can he, on the other hand, compel the mortgagor to advance money for the renewal of the leases without an express agreement between them to that effect.

Mortgagee in  
possession must  
account.

When the mortgagee is in possession, he is considered in equity, in some measure, in the light of a trustee, or bailiff, for the mortgagor, and is accountable for the rents and profits of the land; and therefore, if *without the assent of the mortgagor* he assigns over the mortgage to another, he will be held liable to account for the profits received *subsequently* even to the assignment, on the principle that having turned the mortgagor out of possession, it is incumbent on him to take care in whose hands he places the estate.<sup>3</sup> The consequence of this rule of equity is, that the mortgagor is usually asked, and may easily be compelled, to concur in the assignment.

Even though he  
has assigned the  
mortgage.

Mortgagee is ac-  
countable for  
what he actually  
receives, or what  
but for his *wilful*  
*default* he might  
have received.

But although the mortgagee is liable to account, he is not obliged to account according to the actual value of the land, nor is he bound by any proof that the land is worth so much, unless it can be proved that he made so much out of it, or might have done so but for his own wilful default, as if without cause he turned out a sufficient tenant who held it at so much rent, or refused to accept a tenant who would have given so much for it.<sup>4</sup> This limited protection accorded to the mortgagee is so accorded to him,

<sup>1</sup> *Manlove v. Bale*, 2 Vernon, 87; *Godfrey v. Watson*, 3 Atk. 518.

<sup>2</sup> *Coote*, 344.

<sup>3</sup> *Coote*, 303; *National Bank of A. v. United Hand in Hand Co.*, 4 App. Ca., 301.

<sup>4</sup> *Coote*, 345; *Anon.* 1 Vern. 46; *Simmins v. Shirley*, L. R. 6 Ch. Div. 173; *Eyre v. Hughes*, L. R. 2 Ch. Div. 148.

because it is the laches of the mortgagor, that he lets the land lapse into the hands of the mortgagee by the non-payment of the money; therefore, except as above-mentioned, when the mortgagee enters, he is only accountable for what he actually receives, and is not bound to take the trouble of making the most of another's property,<sup>1</sup> and above all the mortgagee is not bound to work or to keep working, at a speculative profit, the minerals in the land mortgaged.<sup>2</sup> The same rule, limiting the accountability of a mortgagee in possession, applies to the mortgagee selling under his power of sale.<sup>3</sup>

The mortgagee, without payment of principal, interest, and costs, cannot be compelled by the mortgagor or his assigns to produce the title-deeds, even though their production is required for the purpose of enabling the mortgagor to negotiate a loan, and so to pay off the mortgage.<sup>4</sup> But upon redemption, the mortgagee must be in a position to hand over all the title-deeds, and will be liable in damages to the mortgagor for any title-deed that is missing, or fraudulently disposed of.<sup>5</sup>

Mortgagee until payment cannot be compelled to produce his title-deeds.

It seems that a mortgagee cannot accept a valid lease from the mortgagor, even, it appears, though free from circumstances of fraud, and at a fair rent. The reason for this disability has been thus stated: "The mortgagor is under the control of the mortgagee in the very subject-matter of the contract, and if the mortgagee had distinctly said to the mortgagor, 'You must let to me a lease for ninety-nine years, at the rent which I think fit to give, and if you will not, I will harass you by all the means

Mortgagee cannot take a valid lease from mortgagor.

<sup>1</sup> Coote, 345.

<sup>2</sup> Rowe v. Wood, 1 Jac. & Walk. 315.

<sup>3</sup> Mayer v. Murray, 8 Ch. Div. 424.

<sup>4</sup> Damer v. Lord Portarlington, 15 Sim. 380; and see Sheffield v. Eden, 10 Ch. Div. 291.

<sup>5</sup> James v. Rumsey, 11 Ch. Div. 398.

by which a mortgagee can harass a debtor;' it is plain a lease so obtained could not stand. If the same thing can be done without a word spoken, the same consequences ought to follow. Ought evidence of such a conversation to be required? Is it not better to hold, as in the case of a trustee, 'because this may be done, it shall be taken as done, and the act, if disputed, shall be invalid.'''<sup>1</sup>

Mortgagee can-  
not in equity  
make a binding  
lease.]

A further considerable disability annexed to the mortgagee's estate is, that although he is at law the actual owner, and consequently can make and is the only person to make a good legal title, yet he cannot in equity make a valid or binding lease, unless, it seems, it is of necessity, and to avoid a probable loss.<sup>2</sup> The consequence of this rule is, that both the mortgagor and the mortgagee concur in making leases, wherever permanency of holding is desirable.

Renewed lease  
holds.'

Equity holds that if leaseholds be in mortgage, and the mortgagee renew, he will take the renewed lease subject to the like equity, as was subsisting in the old lease;<sup>3</sup> and if an advowson be in mortgage, and the living become vacant, the mortgagor, and not the mortgagee, shall present;<sup>4</sup> nor will equity permit the mortgagor to agree to the contrary, for the mortgagee shall have no benefit beyond his principal, interest, and costs.

Mortgagee can  
not fell timber.

A further restriction on the mortgagee in possession is, that he shall not be permitted to waste the estate.<sup>5</sup> If he proceed to fell timber, an account will be decreed, and the produce applied, first, in payment of the interest, and then, in sinking the principal, and equity will grant an in-

<sup>1</sup> Webb v. Rorke, 2 Sch. & Lef. 661; Coote, 364.

<sup>2</sup> Hungerford v. Clay, 9 Mod. 1.

<sup>3</sup> Holt v. Holt, 1 Ch. Ca. 190.

<sup>4</sup> Mackenzie v. Robinson, 3 Atk. 559.

<sup>5</sup> Hanson v. Derby, 2 Vern. 392.

junction against him, unless the security prove defective, in which case the court will not restrain him from felling timber, the produce being of course applied in ease of the estate.<sup>1</sup> The like rules apply to the opening of new mines.<sup>2</sup> So, if the mortgagee unnecessarily pulls down buildings and erects new buildings without the consent of the mortgagor, he is liable for any loss of rent which is thereby occasioned.<sup>3</sup>

The leading principles or rules of the doctrine of tacking are fully stated in the case of *Brace v. Duchess of Marlborough*.<sup>4</sup>

1. "That if a third mortgagee buys in the first mortgage, being a legal mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side and equal equity, he shall squeeze out the second mortgagee, and this, the Lord Chief-Justice Hale called a 'plank' gained by the third mortgagee, or *tabula in naufragio*, which construction is in favor of a purchaser, every mortgagee being such *pro tanto*."

[The English doctrine of tacking has been universally rejected in the United States—as being impossible under our system of recording and registering mortgages.<sup>5</sup>]

Equity having determined that the mortgage debt shall be considered the principal, and the land a pledge, and as a consequence that the mortgagor,

Unless security be insufficient.

The doctrine of tacking,—its rules.

1. Third mortgagee without notice of second, buying in first mortgage with notice of second, may tack.

Special remedies of mortgagee,—  
(a) Foreclosure.

<sup>1</sup> *Withrington v. Bankes*, Sel. Ch. Ca. 30.

<sup>2</sup> *Hanson v. Derby*, 3 Vern. 392; *Millet v. Davey*, 31 Beav. 470.

<sup>3</sup> *Sandon v. Hooper*, 6 Beav. 246; 14 L. J. Ch. 120.

<sup>4</sup> 2 P. W. 491; and see (regarding the rule in *Toulmin v. Steere*, 3 Mer. 210) *Adams v. Angell*, L. R. 5 Ch. Div. 634; *Cracknall v. Janson*, L. R. 6 Ch. Div. 735.

<sup>5</sup> Pom. Eq. Jur., § 768 note.

notwithstanding his breach of condition and the consequent forfeiture at law of his estate, shall be relievable in equity on payment of principal, interest and costs, and that the mortgagee in possession was accountable for the rents and profits; it became, on the other hand, just, that the mortgagee should not be subject to a perpetual account, nor converted into a perpetual bailiff, but that after a fair and reasonable time given to the mortgagor to discharge the debt, he should lose his equity, or, in other words, be foreclosed his right of redemption.

Foreclosure action—nature of, and time for.

An intermediate mortgagee is entitled to file a bill or commence an action of foreclosure against the mortgagor, and all mortgagees subsequent to himself;<sup>1</sup> and in his action he usually offers to redeem any mortgages prior to himself whom he makes parties to the action.

(b) Sale,—either,  
(1) Under 15 & 16  
Vict., c. 86, by  
order of the  
court.

Before the stat. 15 and 16 Vict., c. 86, courts of equity, except in a few cases, refused to decree a sale against the will of the mortgagor; but under that statute, s. 48, the Court of Chancery may direct a sale of mortgaged property instead of a foreclosure, on such terms as it may think fit.

[As much of the proceeds as is necessary to pay the debt, interest and costs is given to the mortgagee; the balance is handed over to the mortgagor. “The mortgagee’s remedy in many of the United States is prescribed and regulated by statute and in some of them a foreclosure is accomplished by petition, or *scire facias*. In others the proceedings by bill in equity are retained, being in some cases however, slightly modified by statute,” and in nearly all of them the proceedings in foreclosure result in a sale of the mortgaged premises.<sup>2</sup>]

<sup>1</sup> 2 Sp. 674.

<sup>2</sup> Bisph. § 156.



A power of sale, even before that Act, was usually inserted in mortgage-deeds, giving the mortgagee authority to sell the premises; but such a power was only permitted where the mortgaged land did not exceed in value the money lent; for if the security were very ample, it was not likely that the mortgagor would consent to such a power being given to the mortgagee, in case default should be made in payment; and the concurrence of the mortgagor in the sale is not necessary to perfect the title of the purchaser.<sup>1</sup> The mortgagee having sold, is at liberty to retain to himself principal, interest, and costs; and having done this, the surplus, if any, must be paid over to the person or persons who (but for the sale) would have been entitled to redeem.

Or (2) under power of sale in the mortgage-deed.

If a debt be secured by the mortgage of real estate, and also collaterally by covenant or by bond, the mortgagee may pursue all his remedies at the same time.<sup>2</sup> If the mortgagee obtain full payment on the bond or covenant, the mortgagor is by the fact of payment entitled to a reconveyance of the estate, and foreclosure is rendered unnecessary. But if the mortgagee obtains only part payment on the bond or on the covenant, he may institute or go on with his foreclosure action, and giving credit in account for what he has received on the bond or covenant, he may foreclose for nonpayment of the remainder. On the other hand, if he obtains a foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant; but it is held, that by doing so he gives

Mortgagee may pursue all his remedies concurrently.

If mortgagee foreclose first, and then sue on the covenant, he opens the foreclosure, and mortgagor may redeem.

<sup>1</sup> *Corder v. Morgan*, 18 Ves. 344; *Newman v. Selfe*, 33 Beav. 522; *Dicker v. Agerstein*, L. R. 3 Ch. Div. 600.

<sup>2</sup> *Lockhart v. Hardy*, 9 Beav. 349; *Marshall v. Shrewsbury*, L. R. 10 Ch. App. 250.

Mortgagee must therefore have the estate in his power.

to the mortgagor a renewed right to redeem the estate, and get it back, or, in other words, he thereby opens the foreclosure, and consequently upon the commencement of an action against the mortgagor on the bond after foreclosure, the mortgagor may commence an action, or even, *semble*, counter-claim, for redemption, and upon payment of the whole debt secured by the mortgage, he is entitled to have the estate back again, and the securities given up. After foreclosure, therefore, the court will not restrain the mortgagee from suing on the bond, *provided he retains the mortgaged estate in his power*, ready to be redeemed in case the mortgagor should think fit to avail himself of the foreclosure;<sup>1</sup> but if on the other hand the mortgagee has so dealt with the mortgaged estate as to be unable to restore it to the mortgagor on full payment,<sup>2</sup> the court will prevent his suing at law on the bond or covenant to receive the residue of the mortgage-money.<sup>3</sup> A foreclosure decree is almost always liable to be opened, even after a long interval of time and intermediate dealings with the property; in other words a mortgagor may redeem even after foreclosure absolute, but only upon terms of the strictest equity.<sup>4</sup>

The equity of redemption follows the limitations of the original estate.

Mortgage by husband of his wife's estate.

There is a class of cases in which the question has been, whether it is intended by the parties making the mortgage that the equity of redemption shall be limited in a manner different from the uses subsisting in the estate prior to the mortgage, or shall result to the same uses. These questions have generally arisen in mortgages by husband and wife of the wife's estate; and the principle of equity in such cases is, that if money be borrowed by the

<sup>1</sup> 2 Sp. 682.

<sup>2</sup> Lockhart v. Hardy, 9. Beav. 349.

<sup>3</sup> Palmer v. Hendrie, 27 Beav. 349.

<sup>4</sup> Campbell v. Hoyland, L. R. 7 Ch. Div. 166.

husband and wife upon the security of the wife's estate, although the equity of redemption is by the mortgage deed reserved to the husband and his heirs, or to the husband and wife and their heirs, yet there shall be a *resulting* trust for the benefit of the wife and her heirs, and that the wife or her heir shall redeem, and not the heir of the husband, her estate being in equity deemed only a security for his debt.<sup>1</sup> But at the same time, the intention to alter the previous title may be manifested by the language of the proviso itself, and there is no necessity for an express declaration or recital to that effect.<sup>2</sup>

Equity of redemption results to wife.

Unless a different intention manifested.

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<sup>1</sup> *Huntingdon v. Huntingdon*, 2 Smith L. C. 1032; *Jackson v. Parker*, Amb. 687; *Jackson v. Innes*, 1 Bligh. 104; *Whitbread v. Smith*, 3 De G. M. & G. 727; *Coote*, 523; and distinguish the case of *Dawson v. Bank of Whitehaven*, L. R. 6. Ch. Div. 218, which was a case of husband and wife mortgaging the husband's estate, the wife being a concurring party in order to release her dower therein.

<sup>2</sup> *Atkinson v. Smith*, 3 De G. & J. 186-192; *Jones v. Davies*, L. R. 8 Ch. Div. 205.

## CHAPTER XVII.

OF EQUITABLE MORTGAGES OF REALTY BY DEPOSIT OF  
TITLE-DEEDS.

Statute of Frauds  
requires con-  
tracts concerning  
lands to be in  
writing.

The Statute of Frauds<sup>1</sup> enacts that "no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such actions shall be brought, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Notwithstanding this statute, it is now decided<sup>2</sup> that if the title-deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of his creditor, or of some third person on his behalf,<sup>3</sup> such deposit is of itself evidence of an *agreement executed* for a mortgage of the estate,<sup>4</sup> of which agreement the creditor may avail himself as of an agreement in writing for that purpose; for he may file his bill for the completion of the security by a legal conveyance from his debtor, who will not be

Deposit of title-  
deeds, *being an  
agreement executed*  
is not within the  
statute.

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<sup>1</sup> 29 Car. II., c. 3. s. 4.

<sup>2</sup> Russel v. Russel, 1 Smith L. C. 726.

<sup>3</sup> *Ex parte Coming*, 9 Ves, 115.

<sup>4</sup> *Ex parte Wright*, 19 Ves. 258.

allowed to plead the Statute of Frauds.<sup>1</sup> It appears to be now finally settled that a mortgagee by deposit is entitled to the remedy by foreclosure;<sup>2</sup> but, of course, he is also entitled to a sale.<sup>3</sup>

In *Keys v. Williams*,<sup>4</sup> Lord Abinger said,—“The Origin of the doctrine. doctrine of equitable mortgages has been said to be an invasion of the Statute of Frauds.—But in my opinion that statute was never meant to affect the transaction of a man borrowing money and depositing his title-deeds as a pledge of payment. A court of law could not assist such a party to recover back his title-deeds by an action of trover; the answer to such an action being, that the title-deeds were pledged for a sum of money and that till the money is repaid, the party has no right to them. So, if the party came into equity for relief, he would be told that before he sought equity he must do equity, by repaying the money, in consideration for which the deeds had been lodged in the other party's hands.”

In *Russel v. Russel*<sup>5</sup> it was decided that the deeds Deposit of deeds covers further advances. were a security for the sum advanced at the time of the deposit, and only for that sum. But this rule has been extended, and it is now held that such a deposit will cover future advances, if such was the agreement when the first advance was made; or if it can be proved that a subsequent advance was made

<sup>1</sup> *Pryce v. Bury*, 2 Drew. 42; *Ferris v. Mullins*, 2 Sm. & Giff. 378; *Ex parte Moss*, 3 De G. & Sm. 599. [*Chase v. Peck*, 21 N. Y. 587; *Griffin v. Griffin*, 3 C. E. Green 104; *Williams v. Stratton*, 10 S. & M. 418. They have been disapproved in Kentucky, Pennsylvania and Ohio. Bisp. Eq. §357.]

<sup>2</sup> *Pryce v. Bury*, L. R. 16 Eq. 153 n.; *James v. James*, *ibid*; and see *Marshall v. Shrewsbury*, L. R. 10 Ch. App. 250; *Backhouse v. Charlton*, 8 Ch. Div. 444.

<sup>3</sup> *York Union Banking Co. v. Astley*, 11 Ch. Div. 205.

<sup>4</sup> 3 Y. & C. Exch. Ca. 55, 61.

<sup>5</sup> 1 Smith L. C. 726.

on an agreement, express or implied, that the deeds were to be a security for it as well.<sup>1</sup>

Deposit of deeds for purpose of preparing a legal mortgage.

Where there has been a deposit of title-deeds for the purpose of preparing a legal mortgage, the balance of authority seems to be in favor of the proposition that a delivery of deeds for the purpose of preparing a legal mortgage constitutes, in fact, a valid interim equitable mortgage,<sup>2</sup>—that interim effect being not inconsistent with the expressed purpose of the deposit of title-deeds.

Parol agreement to deposit deeds for money advanced.

A parol agreement to deposit title-deeds for a sum of money advanced does not without an actual deposit constitute a good equitable mortgage;<sup>3</sup> but if in writing, such an agreement would be good, without an actual deposit.

All title-deeds need not be deposited.

It is now clearly decided that in order to create an equitable mortgage it is not necessary that all the title-deeds, or even all the material title-deeds, should be deposited; it is sufficient if the deeds deposited are material to the title, and are proved to have been deposited with the intention of creating a mortgage.<sup>4</sup>

Equitable mortgagee parting with the title-deeds to mortgagor.

An equitable mortgagee who parts with the title-deeds, and so enables the depositor to make another equitable mortgage, may be postponed to such second equitable mortgagee by reason of his laches, in not getting back the deed—on the principle that, as between two innocent parties, the one must suffer who has permitted the fraud to be committed.<sup>5</sup>

<sup>1</sup> *Ex parte* Kensington, 2 V. & B. 83; *Ede v. Knowles*, 2 Y. & C. C. 172; *James v. Rice*, 5 De G. M. & G. 461.

<sup>2</sup> 1 Smith L. C. 733.

<sup>3</sup> *Ex parte* Coombe, 4 Mad. 249; *Ex parte* Farley, 1 M. D. & De G. 683.

<sup>4</sup> *Lacon v. Allen*, 3 Drew. 579; *Roberts v. Croft*, 24 Beav. 223; 2 De G. & Jo. 1.

<sup>5</sup> *Waldron v. Sloper*, 1 Drew. 193.

An equitable mortgagee by deposit of title-deeds will be entitled to priority over a subsequent legal mortgagee who advanced his money *with notice* of the deposit.<sup>1</sup> And constructive notice will suffice for this purpose; but mere incaution will not prevent the legal mortgagee from asserting his priority over the prior equitable mortgagee. The principles which govern this class of cases are thus summarised by Turner, V.-C., in *Hewitt v. Loosemore*,<sup>2</sup>—“That a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title-deeds, unless there be fraud or gross and wilful negligence on his part; that the court will not impute fraud, or gross or wilful negligence, to the mortgagee, if he has *bona fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the court will impute fraud, or gross and wilful negligence, to the mortgagee, if he omits all inquiry as to the deeds; and I think there is much principle both in the rule itself and in the distinctions upon it. When this court is called upon to postpone a legal mortgagee, its powers are invoked to take away a legal right; and I see no ground which can justify it in doing so, except fraud, or gross and wilful negligence, which, in the eye of this court, amounts to fraud; and I think that in transactions of sale and mortgage of estates, if there be no inquiry as to the title-deeds which constitute the sole evidence of the title to such property, the court is justified in assuming that the purchaser or mortgagee has abstained from making the inquiry from a suspicion that his title would be affected if it was made, and is, therefore, bound to impute to him the knowledge which the inquiry if made would have imparted. But I think, if a *bona*

Equitable mortgagee has priority to subsequent legal mortgagee, with notice. Legal mortgagee postponed to prior equitable mortgagee, if former has been guilty of fraud or gross negligence. Not postponed if he has made *bona fide* inquiry after the deeds.

Gross and wilful negligence tantamount to fraud.

Absence of inquiry after deeds, presumptive evidence of fraud.

<sup>1</sup> *Hiern v. Mill*, 13 Ves. 114; *Jones v. Williams*, 5 W. R. 540.

<sup>2</sup> 9 Hare, 458.

*fide* inquiry is made, and a reasonable excuse given, there is no ground for imputing the suspicion, or the notice which is consequent upon it; but the person who accepts the excuse will afterwards have the burden of showing that it was a reasonable one for any prudent lender of money to accept.”<sup>1</sup>

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<sup>1</sup>Spencer v. Clarke, 9 Ch. Div. 137.



## CHAPTER XVIII.

## OF MORTGAGES AND PLEDGES OF PERSONALTY.

A mortgage of personal property differs from a pledge. The mortgage is a conditional transfer or conveyance of the very property itself, the interim possession usually remaining with the mortgagor; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of a mortgage of lands. A pledge, on the other hand, passes the possession immediately to the pledgee, who acquires at the same time a special property only in the article pledged, with a right of retaining same until the debt is discharged.<sup>1</sup>

Differences between a mortgage and a pledge of personalty, (a.) In their own nature.

In cases of pledges, if a time for the redemption be fixed by the contract, still the pledgor may redeem afterwards, if he applies within a reasonable time. But if no time is fixed for the payment, the pledgor has his whole life to redeem, unless he is called upon to redeem by the pledgee; and in case of the death of the pledgor without such demand, his personal representatives may redeem.<sup>2</sup>

(b.) As regards remedies.

<sup>1</sup> Story 1030; Jones v. Smith, 2 Ves. Jr. 378.

<sup>2</sup> Vanderzee v. Willis, 3 Bro. C. C. 21; Kemp v. Westbrook, 11 Ves. Sr. 278.

Remedy of a pledgee, as a general rule, is at law, and only exceptionally in equity.

Generally speaking, the remedy of the pledgor or his representatives is at law. But if any special ground is shown, as if an account or discovery is wanted, or there has been an assignment of the pledge, a bill will lie in equity.<sup>1</sup>

Remedy of a pledgee, as a general rule, is in equity; but pledgee may also sell, on notice to pledgor.

On the other hand, the pledgee may bring a bill in equity, to sell the pledge.<sup>2</sup> It seems, also, that the pledgee may, after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree of sale.<sup>3</sup>

Differences between a mortgage of *realty* and a mortgage or pledge of *personalty*,

In mortgages of personal property, although the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his bill to redeem, within a reasonable time.<sup>4</sup> There is, however, a difference between mortgages of land, on the one hand, and mortgages and pledges of personal property on the other, in regard to the rights of the parties after a breach of the condition. In such a case, there is no necessity in mortgages of personalty or in pledges (as there usually is in mortgages of realty) to bring a bill of foreclosure; but the mortgagee or pledgee, upon due notice, may sell the personal property mortgaged or pledged. The reason of this difference seems to be the same in principle with that on which equity, as a general rule, refuses to decree a specific performance of an agreement concerning personal chattels; namely, that other things of the same kind, and of the very same worth, even to the owner himself, may be

(a.) As regards remedies.

<sup>1</sup> Jones v. Smith, 2. Ves. Jr. 372.

<sup>2</sup> *Ex parte* Mountfort, 14 Ves. 606, explained in Fisher on Mortgages, 2d ed., p. 498 n. (t), and Carter v. Wake. L. R. 4 Ch. Div. 605.

<sup>3</sup> Kemp v. Westbrook, 1 Ves. Sr. 278; Lockwood v. Ewer, 9 Mod. 278; Pothonier v. Dawson, Holt's N. P. 385; St. 1053. [Strong v. Nat. Bk. 45 N. Y. 718.]

<sup>4</sup> Kemp v. Westbrook, 1 Ves Sr. 278.

purchased for the sum which the articles in question fetch; and, therefore, if such property is mortgaged, the mortgagee may properly be allowed to sell it, on due notice, without the inconvenience of filing a bill of foreclosure.<sup>1</sup>

It appears that in the absence of express agreement to the contrary, a pledgee may, *even before condition broken*, deliver over the pledge to a purchaser or to a sub-pledgee; and in either case, if the pledge is of a negotiable instrument, the pledgor will be bound; but if the pledge is of a non-negotiable instrument, the pledgor is bound only to the extent of the pledgee's own right; accordingly, in the case of a non-negotiable instrument, if the purchaser or sub-pledgee, upon tender to him by the pledgor of the amount due to the original pledgee, should refuse to deliver up the pledge to the original pledgor, the original pledgor may have an action of detinue against the party so refusing.<sup>2</sup>

Pledgee's right of transfer.

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<sup>1</sup> Smith's Manual, 339.

<sup>2</sup> Fisher on Mortgages, 2d ed., p. 71.

## CHAPTER XIX.

## OF LIENS.

Varieties of lien,<sup>1</sup>  
—at law and in  
equity, and  
foundation of the  
equitable juris-  
diction in lien.<sup>2</sup>

Of liens there are many varieties. Thus, a lien may exist in favor of artisans and others, who have bestowed their labor and services in or towards the repair, improvement, and preservation of the property in respect of which the lien is claimed. A lien has also an existence, in many other cases, by the usages of trade; and in maritime transactions, as in the cases of salvage and general average. It is often created and sustained in equity where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money. Moreover a lien even at law is not always confined to the very property upon which the labor or services have been bestowed; but it often is, by the usage of trade, extended to cases of a general balance of accounts, *e. g.*, in favor of factors and others. Consequently, most cases of lien either in themselves involve a foundation for the jurisdiction of equity, or give rise to matters of account; and as the nature of the lien and the amount of the account are often involved in great uncertainty, a resort to a court of equity is in many cases absolutely indispensable for the purposes of justice.

The principal diversities among liens appear to be the following:—

Diversities  
among liens.

(a.) A *particular* lien on goods,—which is confined to the very goods; and a *general* lien on goods,—which extends not only to the particular account but also to the general balance of the accounts.<sup>1</sup>

(b.) A lien on *lands*,—which commences only when the possession of the lands is parted with to the purchaser; and a lien on *goods*—which lasts only while the possession is retained by the vendor, and which ceases when it is parted with to the purchaser.<sup>2</sup> And,—

(c.) The lien of a solicitor on the *deeds and documents* of his client,—which arises *proprio vigore*, but which at the most is only a passive protection; and the lien of a solicitor on a *fund recovered*,—which arises only upon the court's declaring the solicitor entitled to it, and which is in all cases (when once declared) both an active and (comparatively speaking) an immediate remedy and redress.

The lien which a solicitor has on the deeds, books and papers of his client for his costs, is an instance of a lien originating in custom, and afterwards sanctioned by decisions at law and in equity. This lien is a right not depending upon contract; it wants the character of a mortgage or pledge; it is merely an equitable right to withhold from his client such things as have been intrusted to him as a solicitor, and with reference to which he has given his skill and labor, and not (as already suggested) a right to enforce any active claim against his client.<sup>3</sup>

The lien of a  
solicitor on  
deeds, books, &c.

<sup>1</sup> In re Witt, ex parte Shubbrook, L. R. 2 Ch. Div. 489.

<sup>2</sup> Grice v. Richardson, 3 App. Ca. 319.

<sup>3</sup> Bozon v. Bolland, 4 My. & Cr. 358; In re Messenger, ex parte Calvert, L. R. Ch. Div. 317; In re Snell, L. R. 6 Ch. Div. 105; In re Mason v. Taylor, 10 Ch. Div. 729; and see Newington Local Board v. Eldridge, 12 Ch. Div. 349.

On fund realized  
in a suit.

On the other hand, the solicitor's lien upon a fund realised in a suit for his costs of the suit, or immediately connected with it, a lien which (as we have said) he may actively enforce,<sup>1</sup>—is the creation of the statute law, the 23 & 24 Vict., c. 127, s. 28, having enacted that it shall be lawful for the court or judge before whom any suit or matter has been heard,<sup>2</sup> to declare that the solicitor employed therein is entitled to a charge upon the property recovered or preserved by his instrumentality in such suit or matter. A solicitor may even be entitled to both these liens at once,<sup>3</sup> and the lien extends usually to the entire fund, not merely to the particular share of his own client therein.<sup>4</sup>

Lien only commensurate with client's right at the time of the deposit.

It is quite settled that the solicitor's lien on papers exists only as against the client and the representatives of the client; also, that such lien is only commensurate with the right which the client had at the time of the deposit, and is therefore subject to the prior then existing rights of third persons, so that a prior incumbrancer is not prejudiced by it.<sup>5</sup> And just as the solicitor's lien will not prejudice any prior existing equity, so the solicitor's lien will not be prejudiced by an equity arising subsequently to the inchoation of the lien.<sup>6</sup> And the like rule appears to extend also to a lien on a fund

<sup>1</sup> 2 Sp. 802; *Smith's Man.* 342; *Verity v. Wylde*, 4 Drew. 427; *Haymes v. Cooper*, 33 Beav. 431; *Shaw v. Neale*, 6 W. R. 635.

<sup>2</sup> *Higgs v. Schrader*, 3 C. P. D. 252; *Owen v. Henshaw*, 7 Ch. Div. 385. *Brown v. Trotman*, 12 Ch. Div. 880.

<sup>3</sup> *Pilcher v. Arden*, in re *Brook*, 7 Ch. Div. 318.

<sup>4</sup> *Bulley v. Bulley*, 8 Ch. Div. 479. *Lawrence v. Fletcher*, 12 Ch. Div. 858.

<sup>5</sup> *Blunden v. Desart*, 2 Dr. & War. 405; *Young v. English*, 7 Beav. 10; 2 Sp. 800, 801; *Francis v. Francis*, 5 De G. M. & G. 108; *Turner v. Letts*, 7 De G. M. & G. 243.

<sup>6</sup> *Faithful v. Ewen*, 7 Ch. Div. 495; *Moet v. Pickering*, Ch. Div. 372; and distinguish *Pringle v. Gloag*, 40 Ch. Div. 676; *Hamer v. Sells*, 11 Ch. Div. 942.

recovered ; thus, it has been decided that the lien of a solicitor on a sum due or payable to his client prevents a set-off against a sum due from the client.<sup>1</sup>

A banker has a lien on the securities deposited by a customer for the customer's general balance of account, and this right subsists, where not inconsistent with the terms of a special contract for specific security.<sup>2</sup> Banker's lien.

Rights in equity equivalent to liens may also arise under various circumstances. Thus real or personal estate may be charged by an agreement express or implied, creating a trust, which equity will enforce, both against the person creating the lien, and against others claiming, as volunteers, or with notice, under him. Under this head will fall the cases of legacies and portions charged on land. Quasi-liens. As where a charge in the nature of a trust.

It has been held that, where a man agrees to sell his estate, and to lend money to the purchaser for improving the estate, he will have a lien for the advances so made, as well as for the purchase-money.<sup>3</sup> Vendor's lien for advances for improvements.

If one of two joint-tenants of a lease renew for the benefit of both, he will have a lien on the moiety of the fines and expenses.<sup>4</sup> Joint tenant's lien for costs of renewing lease.

But it seems that where two or more purchase an estate, and one pays the money, and the estate is conveyed to them both, the one who pays the money gains neither a lien nor a mortgage, because there is no contract for either ; he has a right of action only.<sup>5</sup> No lien where two purchase and one pays the money. So also, if one of two joint lessees and occupiers of

<sup>1</sup> *Ex parte Clelland*, L. R. 2 Ch. App. 808; *Ex parte Smith*, L. R. 3 Ch. App. 125.

<sup>2</sup> *In re European Bank*, L. R. 8 Ch. App. 41.

<sup>3</sup> *Ex parte Linden*, 1 Mont. D. & D. 435; 2 Sp. 803.

<sup>4</sup> *Ex parte Grace*, 1 B. & P. 376.

<sup>5</sup> 2 Sp. 803.

a house redecorates it at his own expense in the first instance, he has no lien in respect thereof,<sup>1</sup> and in such a case he may have no action or remedy at all.

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<sup>1</sup>Kay v. Johnson, 21 Beav. 536; and see Saunders v. Dunman, 7 Ch. Div. 825.



## CHAPTER XX.

## PENALTIES AND FORFEITURES

The doctrine of equity with regard to penalties Doctrine. and forfeitures may be stated in the following words:—Wherever a penalty or a forfeiture is inserted, merely to secure the performance of some act, or the enjoyment of some right or benefit, equity regards the performance of such act, or the enjoyment of such right or benefit, as the substantial and principal intent of the instrument, and the penalty or forfeiture as only accessory, and will therefore relieve against the penalty or forfeiture Penalty, &c., deemed accessory. Compensation decreed. by simply decreeing a compensation in lieu of the same, proportionate to the damage really sustained.<sup>1</sup> The penal sum is usually double the amount of the debt, and the obligee never recovers on account of principal, interest, and costs, or damages, more than the amount of the penalty, and usually much less.

In all these cases, the general test by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can or cannot be made. If compensation can be made, Can compensation be made? then if the penalty is to secure the mere payment of If it can, equity relieves.

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<sup>1</sup> *Sloman v. Walter*, 2 Smith L. C. 1112.

money, courts of equity will relieve the party upon his paying the principal and interest.<sup>1</sup> And if the penalty is to secure the performance of some collateral act or undertaking, the court will ascertain the amount of damages and grant relief on payment thereof.<sup>2</sup>

Party cannot avoid the contract by paying the penalty.

Although equity will generally relieve against a penalty, where it is only intended to secure the performance of a contract; on the other hand, it will not permit the party bound by the agreement to avoid that agreement by paying the stipulated penalty. "The general rule of equity," observes Lord St. Leonards, in *French v. Macale*,<sup>3</sup> "is, that if a thing be agreed to be done, though there is a penalty annexed to its performance, yet the very thing itself must be done."<sup>4</sup>

*French v. Macale*, — Where covenantor may do either of two things, paying higher for one alternative than the other, that is not a case of penalty.

Where, however upon the construction of the contract, the real intent of the contract is that a covenantor should have either of the two alternative modes of user at his option,—that if he elects to adopt one of those alternatives, he is to pay a certain sum of money, but that, if he chooses to adopt the other alternative, he is to pay an additional sum of money,—in such a case, equity will look upon the additional payment, not as a penalty, but as liquidated damages fixed on by the parties, and will not relieve the covenantor from payment of the additional sum agreed upon, in case he should do such latter alternative act. This distinction is taken by Lord St. Leonards, in the case of *French v. Macale*,<sup>5</sup> where he lays down the law as follows:—"If a man covenant to abstain from doing a certain act, and agree

<sup>1</sup> Elliott v. Turner, 13 Sim. 447. [Gould v. Bugbee, 6 Gray, 371.]

<sup>2</sup> Daniell's Ch. Pr. 1510-1512.

<sup>3</sup> 2 Drew. & War. 274.

<sup>4</sup> Howard v. Hopkyns, 2 Atk. 370.

<sup>5</sup> *Ubi supra*. See also Parfitt v. Chambre, L. R. 15 Eq. 36.

that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act; he cannot elect to break his engagement by paying for his violation of the contract—The question for the court to ascertain is, whether the party is restricted by covenant from doing the particular act, although, if he do it, a payment is reserved; or whether, according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act, on payment of what is agreed upon as an equivalent. If a man let meadow-land for two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, no doubt this is a perfectly good and unobjectionable contract; the breaking-up the land is not inconsistent with the contract, which provides that in case the act is done the landlord is to receive an increased rent.” Lord Rosslyn said of such a case at that,<sup>1</sup> “that it was the demise of land to a lessee, to do with it as he thought proper; but if he used it in one way, he was to pay one rent, and if in another, another; that is a different case from an agreement not to do a thing, with a penalty for doing it.”<sup>2</sup>

Having premised the above general remarks, it is proposed to lay down a few rules which may aid the student in arriving at a solution of the question, whether a sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty, or as liquidated and ascertained damages:—

1. Where the payment of a smaller sum is secured by a larger, the sum agreed for must always be considered as a penalty.<sup>3</sup>

Rules as to distinction between a penalty and liquidated damages.

1. Smaller sum secured by larger

<sup>1</sup> Hardy v. Martin, 1 Cox. 27.

<sup>2</sup> Herbert v. Salisbury & Yeovil Railway Company, L. R. 2 Eq. 221.

<sup>3</sup> Astley v. Weld, n, 2 B. & P. 350-354; Aylet v. Dodd, 2 Atk. 239.

2. Covenant to do several things, and one sum for breach of *any* or *all*.

*Kemble v. Farren*,—a case in which penal sum was declared not penal but liquidated, and yet court relieved.

2. Where a deed contains covenants, or an agreement contains provisions, for the performance of several acts, and then a sum is stated at the end to be paid upon the breach of *any* or of *all* such stipulations, and that sum will be in some instances too large, and in others too small a compensation for the injury occasioned, that sum is to be considered as a penalty. Thus, in *Kemble v. Farren*,<sup>1</sup> the defendant had engaged to act as principal comedian at Covent Garden for four seasons, conforming in all things to the rules of the theatre. The plaintiff was to pay the defendant £ 3, 6s. 8d. every night the theatre was open, with other terms. The agreement contained a clause, that if either of the parties should neglect or refuse to fulfill the said agreement, or *any part thereof*, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by such omission should amount, and which sum was there declared by the parties to *be liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof*. The breach alleged was, that the defendant refused to act during the second season. Notwithstanding these sweeping words, the court decided that the sum must be taken to be a penalty, as it was not limited to those breaches which were of an uncertain nature and amount. And Tindal, C. J., said, “that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty, appears to be a contradiction in terms”.<sup>2</sup>

<sup>1</sup> 6 Bing; 141.

<sup>2</sup> Mayne on Dam. 3rd. ed. 192; *Davies v. Penton*, 6 B. & C. 223; *Horner v. Flintoff*, 9 M. & W. 681; 3 Byth. & Jarm. Conv. by Sweet, 325; *Dimech v. Corlett*, 12 Moo. P. C. C. 199.

3. On the other hand, if there be a contract consisting of one or more stipulations, the damages from the breach of which cannot be measured, then the contract must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty.<sup>1</sup>

3. Where amount of injury cannot be measured.

4. There never was any doubt that if there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation in order to avoid the difficulty.<sup>2</sup>

4. If only one event on which money is to be payable and no means of ascertaining damage.

5. The mere use of the term "penalty," or "liquidated damages," does not determine the intention of the parties, that the sum stipulated should really be what is said to be; but it is like any other question of construction, to be determined by the nature of the provisions, and the language of the whole instrument.<sup>3</sup>

5. The mere use of term "penalty," or "liquidated damages," not conclusive. A question of construction.

6. Where the expressions are doubtful or contradictory, the court, it seems, will lean in favor of the construction which treats the sum named as a penalty only, and not as fixing the measure of the damages, such construction being most consonant with justice.<sup>4</sup> But the mere largeness of amount fixed will not *per se* be sufficient reason for holding it to be a penalty.<sup>5</sup>

6. Court leans towards construing sum as a penalty.

<sup>1</sup> Mayne on Dam. 3d ed. 129; *Atkyns v. Kinnier*, 4 Exch. 776-783; *Galsworthy v. Strutt*, 1 Exch. 659.

<sup>2</sup> *Sainter v. Ferguson*, 8 C. B. 730; *Sparrow v. Paris*, 8 Jur. N. S. 391; *Byth. & Jarm. Conv. by Sweet*, 326; *Mayne on Dam.* 3rd. ed. 130.

<sup>3</sup> *Dimech v. Corlett*, 12 Moo. P. C. C. 199; *Green v. Price*, 13 M. & W. 701; 16 M. & W. 346; *Jones v. Green*, 3 You. & J. 304; [*Lee v. Overstreet*, 44 Ga. 507; *Hannaker v. Schroers*, 49 Mo. 406.]

<sup>4</sup> *Davies v. Penton*, 6 B. & C. 216.

<sup>5</sup> *Astley v. Weldon*, 2 B. & P. 351.

Forfeitures governed by same principles as penalties,—excepting as between landlords and tenants.

The same general principles, which apply to equitable relief against penalties, govern the courts of equity in relieving against forfeitures,—at least in cases other than those arising under leases and other strict contracts.<sup>1</sup> And even in the case of leases, equity will interfere to a limited extent to relieve against a forfeiture. Thus, equity will relieve against the forfeiture of a lease for non-payment of rent, on the lessee paying what is due,<sup>2</sup>—that being a mere money demand.

Forfeiture for breach of covenant to repair.

It seems not quite settled whether equity will (and the better opinion is, that equity cannot) relieve against a forfeiture arising from a breach of covenant to repair, or, in fact, any breach of covenant other than the breach of covenant to pay rent, unless under very special circumstances.<sup>3</sup> Equity will, however, require the covenantee to be satisfied with a substantial performance on the part of the covenantor, where the nature of the covenant admits of such performance. But if the contract be such that the court cannot secure its substantial performance, or where it is of the very essence of the contract, that it should be strictly performed (in which case, the strict performance is matter of substance and not of form merely,) equity will not relieve against a forfeiture for non-performance.<sup>4</sup>

Breach of covenant to insure.

The courts of equity could not relieve a tenant from forfeiture for breach of a covenant to insure.<sup>5</sup> “Lord Eldon laid it down that the court would not

<sup>1</sup> Cooper v. L. B. & S. C. Ry. Co., 4 Exch. Div. 88.

<sup>2</sup> Freem. Ch. Rep. 114. The common law courts may now relieve in such a case, 15 & 16 Vict., c. 76. ss. 210-212; 23 & 24 Vict., c. 126, s. 1; Bowser v. Colby, 1. Hare, 126.

<sup>3</sup> Hill v. Barclay, 18 Ves. 62.

<sup>4</sup> Hill v. Barclay, 16 Ves. 402; 18 Ves. 62; Gregory v. Wilson, 9 Hare, 683; Nokes v. Gibbon, 3 Drew. 681; Bamford v. Creasy, 3 Giff. 675; Croft v. Goldsmid, 24 Beav. 312.

<sup>5</sup> Green v. Bridges, 4 Sim. 96.

relieve against breaches of covenant except in cases where payment of money is a complete compensation, and will put the party in the same situation as he would have been if there had been no breach. In this case the landlord could not by any payment of money be put into the same situation, as he was entitled to be under the covenant." This rule having been found to operate very hardly on those few lessees who inadvertently and not wilfully neglected to insure, the legislature stepped in and remedied it, but in the case of such inadvertent neglects only. Under 22 & 23 Vict., c. 35, s. 4, the court of equity <sup>22 & 23 Vict., c. 35.</sup> is in that case entitled to relieve against a forfeiture for non-insurance, but only upon a full compliance with the particulars in the Act expressed, and which are,—that no damage from fire shall, in the meantime, have happened, and that the inadvertence has been purged by the effecting of a proper fire-insurance before coming for relief.<sup>1</sup>

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<sup>1</sup> Page v. Bennett, 2 Giff. 117.

## CHAPTER XXI.

## MARRIED WOMEN.

SEC. I.—SEPARATE ESTATE.	SURVIVORSHIP.
SEC. II.—PIN-MONEY AND PARAPHERNALIA.	SEC. IV.—SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS.
SEC. III.—EQUITY TO A SET- TLEMENT AND RIGHT OF	

IN no respect do the rules of equity show a more complete divergence from those of the common law than on the subjects of the rights and liabilities of married women.

*Rights of feme  
covert at common  
law.*

*The husband  
takes all her  
property as a  
general rule.*

By the common law the husband on marrying becomes entitled to receive the rents and profits of the wife's real estates during the joint lives;<sup>1</sup> he becomes absolutely entitled to all her chattels personal in possession,<sup>2</sup> and to her choses in action if he reduce them into possession during the coverture;<sup>3</sup> or if he do not, but survive her, he,<sup>4</sup> and after his death his administrator,<sup>5</sup> on taking out administration to

<sup>1</sup> Polyblank v. Hawkins, Doug. 329; Moore v. Vinten, 12 Sim. 161.

<sup>2</sup> Co. Litt. 300 a.

<sup>3</sup> Scawen v. Blunt, 7 Ves. 294; Wildman v. Wildman, 9 Ves. 174; Co. Litt. 351.

<sup>4</sup> Betts v. Kimpton, 2 B. & Ad. 277; Proudley v. Fielder 2, My. & K. 57.

<sup>5</sup> In the goods of Harding K. R. 2. P. & D. 394.



the wife, is entitled to recover. He also becomes entitled *jure mariti* to her legal chattels real, *i. e.*, leaseholds, with full power to aliené them even though reversionary;<sup>1</sup> though, if he die before his wife without having reduced into possession her choses in action,<sup>2</sup> or without having aliened her chattels real,<sup>3</sup> they will survive to her.

The husband acquires this interest in the property of his wife in consideration of the obligation, which upon marriage he contracts, of maintaining her. In consideration of maintaining her. Wife remediless at common law. But while the courts of common law were thus active in enforcing the rights of the husband, they rather over-did matters, and frequently to the detriment of the wife: for they gave her no remedy whatever in case even of the husband's refusing or neglecting to fulfill the duties cast upon him by the marriage, or in the case of the husband's bankruptcy or insolvency. In all these cases, therefore, a married woman resorting to common law might have been left utterly destitute, no matter how large a fortune she might have brought to her husband on marriage. Can it be a matter of surprise, therefore, that equity, holding that there should be no wrong without a remedy, found ample ground for its interference, and raised up, with reference to married women, a system founded on justice and right, and utterly in contravention of the doctrines of the common law. Interference of equity.

It is proposed to consider the original jurisdiction of the Court of Chancery regarding married women, which still continues in its entirety, though with a scope widened in certain instances by the recent legislation, and incidentally to explain the effect of such recent legislation. Protective jurisdiction of Court of Chancery.

<sup>1</sup> *Donne v. Hart*, Russ. & My. 363; *Bales v. Dandy*, 2 Atk. 207; 3 Russ. 72 *n.*

<sup>2</sup> *Co. Litt.* 351 *b.*

<sup>3</sup> *Ibid.*

## SECTION I.—THE WIFE'S SEPARATE ESTATE.

*Feme covert* can not at common law hold property apart from her husband. But she may do so in equity.

At common law the separate existence of the wife is not, as a general rule, known or contemplated, it being considered merged by the coverture in that of the husband, and the wife being no more recognized than is the *cestui que trust* or the mortgagor; the legal estate, which is the only interest the law recognizes, being in others.<sup>1</sup> She is not permitted by the common law to take or enjoy any real or personal estate separate from and independently of her husband. But in equity, whose creature the wife's separate estate is,<sup>2</sup> the case is widely different. There a married woman is considered capable of possessing property to her own use, independently of her husband; and upon once being permitted to hold property to her separate use as a *feme sole*, she takes it with all its privileges and incidents, including the *jus disponendi*.<sup>3</sup>

Separate estate, how created.

The wife's separate estate may be created out of any species of property, and the modes in which it has been held that property may belong to her independently of her husband are various, being, however principally the following:—

1. By ante-nuptial agreement.

1. The wife may hold separate estate by an ante-nuptial written agreement with the intended husband for that purpose; and such ante-nuptial agreement may be made with reference either to her own property, or to the property of her husband, or of third parties.<sup>4</sup>

2. By special post-nuptial agreement, or where he deserts her.

2. By special agreement with the husband after marriage in certain cases,<sup>5</sup> or where the husband

<sup>1</sup> *Murray v. Barlee*, 3 My. & K. 220.

<sup>2</sup> *Brandon v. Robinson*, 18 Ves. 434.

<sup>3</sup> *Fettiplace v. Gorges*, 1 Ves. Jr. 48.

<sup>4</sup> *Simmons v. Simmons*, 6 Hare, 352; *Tullett v. Armstrong*, 1 Beav. 21.

<sup>5</sup> *Haddon v. Fladgate*, 1 Swab. & Tr. 48; *Pride v. Bubb*, L. R. 7 Ch. App. 64; *Ashworth v. Outram*, L. R. 5 Ch. Div. 923.

deserts her, independently of and long prior to the stat. 20 & 21 Vict., c. 85.<sup>1</sup>

3. Gifts also from the husband to the wife may be made to her separate use, where they are made to her absolutely, and not merely to be worn as ornaments of her person.<sup>2</sup>

<sup>3.</sup> By gifts to wife absolutely from husband.

4. It seems also that a gift from a stranger by delivery merely to the wife during her coverture, even though not expressed to be for her separate use, would be for her separate use.<sup>3</sup>

<sup>4.</sup> By gifts to her from a stranger during coverture.

5. A wife trading separately is entitled to the trade property as her separate estate.<sup>4</sup>

<sup>5.</sup> Wife trading separately.

6. The wife will, of course, hold all such property to her separate use as has been expressly limited to her by devise or otherwise for that purpose, whether before or after coverture; and this is probably the most frequent source of the separate estate of married women, or at all events was so before the [recent legislation on the subject] hereinafter explained.

<sup>6.</sup> By express limitation for that purpose.

It was formerly supposed, that the interposition of trustees was in all arrangements of this sort, whether made before or after marriage, indispensable for the protection of the wife's rights and interests; in other words, it was deemed absolutely necessary that the property, of which the wife was to have the separate and exclusive use, should be vested in trustees for her benefit; and that the agreement of the husband should be made with such trustees, or at least with persons contracting

Interposition of trustees,—not necessary.

<sup>1</sup> Cecil v. Juxon, 1 Atk. 268; Re Pope's Trusts, 21 W. R. 646; 2 Bright's Husb. & Wife, 299.

<sup>2</sup> Graham v. Londonderry, 3 Atk. 393; Grant v. Grant, 13 W. R. 1057; Mews v. Mews, 15 Beav. 529; Baddeley v. Baddeley, 9 Ch. Div. 113.

<sup>3</sup> Graham v. Londonderry, 3 Atk. 393; 1 Bright's Husb. & Wife, 289.

<sup>4</sup> *Ex parte* Shepherd, in re Shepherd, 10 Ch. Div. 573.

with them for the wife's benefit. But although in strict propriety that should always be done, yet it is now firmly established that the intervention of trustees is not indispensable; and that whenever real or personal property is devised to, or otherwise given to or settled upon, a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the rights and claims of her husband, and of his creditors also.<sup>1</sup> And in such a case, the husband will be held a mere trustee for her.<sup>2</sup>

Husband a trustee for wife.

What words held sufficient to create a separate use.

No particular form of words is necessary in order to vest property in a married woman for her separate use.<sup>3</sup> It has been held that the marital rights of the husband will be defeated if there is a gift or settlement of property to his wife or trustees for her, for her "sole and separate use,"<sup>4</sup> "for her own use, and at her own disposal,"<sup>5</sup> "for her own use independent of her husband,"<sup>6</sup> "for her own use and benefit, independent of any other person,"<sup>7</sup> "that she should receive and enjoy the issue and profits,"<sup>8</sup> ["for her use, maintenance and support,"<sup>9</sup> "solely for her own use,"<sup>10</sup> "for her sole use, benefit and behoof."]<sup>11</sup> As to the effect of a devise to a woman, "for her sole use and benefit," there

<sup>1</sup> *Newlands v. Paynter*, 4 My. & Cr. 408. [*Barron v. Barron*, 24 Vt. 375.]

<sup>2</sup> *Parker v. Brooke*, 9 Ves. 583; *Rich. v. Cockell*, 9 Ves. 375; St. 1380. [*Steel v. Steel*, 1 Ired. Eq. 452.]

<sup>3</sup> [*Nix v. Bradley*, 6 Rich. Eq. 48.]

<sup>4</sup> *Parker v. Brooke*, 9 Ves. 583.

<sup>5</sup> *Inglefield v. Coghlan*, 2 Coll. 247.

<sup>6</sup> *Wugstaff v. Smith*, 9 Ves. 520.

<sup>7</sup> *Glover v. Hall*, 16 Sim. 568. [*Pepper v. Lee*, 53 Ala. 33.]

<sup>8</sup> *Tyrrell v. Hope*, 2 Atk. 558.

<sup>9</sup> *Good v. Harris*, 2 Ired. Eq. 630.]

<sup>10</sup> *Jamison v. Brady*, 6 S. & R. 466.]

<sup>11</sup> *Williman v. Holures*, 4 Rich. (Eq.) 479.]

seems to be some doubt upon the authorities. In *Gilbert v. Lewis*,<sup>1</sup> Westbury, C., held that a devise to an unmarried woman without the intervention of trustees, for her sole use and benefit, did not give her a separate estate.<sup>2</sup>

On the other hand, it is no less firmly established that courts of equity will not deprive the husband of his rights at law, except by words which leave no doubt of the intention to exclude him. It has been held, therefore, that no separate use was created where there was a mere direction, "to pay a married woman and her assigns,"<sup>3</sup> or where there was a gift "to her own use and benefit,"<sup>4</sup> or to her "absolute use,"<sup>5</sup> or when payment was directed to be made "into her own proper hands, to and for her own use and benefit,"<sup>6</sup> or when property was given "to be under her sole control."<sup>7</sup>

The rule is laid down in *Peacock v. Monk*,<sup>8</sup> "that a *feme covert* acting with respect to her separate property is competent to act in all respects as if she was a *feme sole*."<sup>9</sup> Where, however, the restriction on anticipation is annexed to the separate use, this power of disposition is taken away.

(a.) It is decided, that personal property settled upon a *feme covert* for her separate use, is subject to all the incidents of property vested in persons *sui juris*, and that she may dispose of it without her husband's consent, whether by act *inter*

What words held not sufficient for that purpose.

The wife's power of disposition over separate estate.

(a.) As to personality.

<sup>1</sup> 1 De G. J. & Sm. 38.

<sup>2</sup> In re Tarsey's Trusts, 1 L. R. Eq. 561.

<sup>3</sup> Lumb v. Milnes, 5 Ves. 517.

<sup>4</sup> Kensington v. Dollond, 2 My. & K. 184. [Tenant v. Story, 1 Rich. Eq. 222.]

<sup>5</sup> *Ex parte* Abbott, 1 Deacon, 338. [Houston v. Embry, 1 Sneed, 481.]

<sup>6</sup> Tyler v. Lake, 2 Russ. & My. 183.

<sup>7</sup> Massey v. Parker, 2 My. & K. 174.

<sup>8</sup> 2 Ves. 190.

<sup>9</sup> Hulme v. Tenant, 1 Smith L. C. 521.

*vivos*,<sup>1</sup> or by will,<sup>2</sup> and this power extends to interests in reversion, as well as to interests in possession;<sup>3</sup> and her husband need not concur in the disposition, and the wife need not acknowledge same.

(b.) As to realty.  
1. Life estate.

(b.) As to real estate, it is also determined, that when settled to the separate use of a married woman, she has the same power over her *life interest* therein, as she would have as a *feme sole*, and a contract to sell or mortgage the interest has been always specifically enforced against her.<sup>4</sup>

2. Fee simple estates.

With regard to real property settled to the separate use of a *feme covert* in fee, it has always been perfectly well ascertained, that so far as regards the *legal* estate, she cannot dispose of that without the concurrence of the person or persons in whom that estate is vested (*viz.*, of her husband or of other her trustees, as the case may be); but as regards the equitable estate it has finally, after much apparent conflict in the authorities, been decided in the important case of *Taylor v. Meads*,<sup>5</sup> that she may dispose of the equitable estate either by will or by an instrument *inter vivos* not acknowledged under the Fines and Recoveries Act.<sup>6</sup> And she has this power whether trustees are interposed or not.<sup>7</sup> Even if trustees be interposed, it is now clear that a married woman can bind her separate property without their assent, unless that is rendered necessary by the instrument giving her the property.<sup>8</sup> As to the

<sup>1</sup> *Wagstaff v. Smith*, 9 Ves. 520.

<sup>2</sup> *Fettiplace v. Gorges*, 3 Bro. C. C. 8; In the goods of *Smith*, 1 Sw. & Tr. 125.

<sup>3</sup> *Sturgis v. Corp*, 13 Ves. 190; *Lechmere v. Brotheridge*, 32 Beav. 353.

<sup>4</sup> *Stead v. Nelson*, 2 Beav. 245; *Major v. Lansley*, 2 Russ. & My. 357.

<sup>5</sup> 34 L. J. Ch. 203; *Pride v. Bubb*, L. R. 7 Ch. App. 64.

<sup>6</sup> 3 & 4 Will. IV., c. 74, s. 77.

<sup>7</sup> *Hall v. Waterhouse*, 13 W. R. 633.

<sup>8</sup> *Essex v. Atkins*, 14 Ves. 542; *Hodgson v. Hodgson*, 2 Kee. 704.

question whether such disposition of her fee simple estates by deed or by will would deprive the husband surviving her of his curtesy estate, assuming that he would otherwise be entitled thereto, the law seems now to be fully settled; for although in the absence of, or subject to, any such disposition by the wife, the husband is entitled to his curtesy, yet in case the wife disposes of the whole estate by deed *inter vivos*, or even by will, the authorities have now fully and explicitly decided (inconsistently with the old rules of real property, but consistently enough with the equitable doctrine of the separate estate), that the husband is by such disposition wholly barred and excluded from his estate by the curtesy.<sup>1</sup>

Upon the principle that a married woman as to her separate property is to be deemed a *feme sole*, she will render it liable by concurring with her trustees in a breach of trust,<sup>2</sup> or by herself committing a breach of trust in respect of other property under the trust,<sup>3</sup> unless she is restrained from anticipation.<sup>4</sup>

If the wife, having property settled to her separate use, effect savings out of it, she has the same power and control over those savings as she had over the separate estate itself; for in the quaint language of Lord Keeper Cowper, "the sprout is to savour of the root and to go the same way;"<sup>5</sup> or in less elegant words, the froth on the stout savours of the stout, and goes the same way; and if the wife have

Separate property liable for her breach of trust. Except restrained from anticipation.

The savings of income of separate estate are also separate estate.

<sup>1</sup> *Roberts v. Dixwell*, 1 Atk. 607; *Morgan v. Morgan*, 5 Madd. 408; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Cooper v. M'Donald*, L. R. 7 Ch. Div. 288.

<sup>2</sup> *Brewer v. Swirles*, 2 Sm. & Giff. 219; *Jones v. Higgins*, L. R. 2 Eq. 538.

<sup>3</sup> *Clive v. Carew*, 1 J. & H. 199.

<sup>4</sup> *Davies v. Hodgson*, 25 Beav. 186; *Pemberton v. M'Gill*, 2 Drew. & Sm. 266; *Stanley v. Stanley*, 26 W. R. 310; 7 Ch. Div. 589.

<sup>5</sup> *Gore v. Knight*, 2 Vern. 535.

a power over the capital, she has also power over the income and accumulations;<sup>1</sup> and the same rule applies to savings out of the income allowed to a married woman upon her husband's lunacy.<sup>2</sup> As even the investments made with such savings or with the accumulations thereof belong still to the married woman for her separate use,<sup>3</sup> a result which, however, does not appear to hold good for the investments of the *capital* moneys of the separate estate.<sup>4</sup>

She may permit her husband to receive the income of her separate estate, even though restrained from anticipation. ¶

“A wife having property settled for her separate use is entitled to deal with the money as she pleases. If she directly authorises the money to be paid to her husband, he is entitled to receive it, and she can never recall it. \* \* \* If the husband and wife living together, have for a long time so dealt with the separate income of the wife, as to show that they must have agreed that it should come to the hands of the husband, to be used by him (of course, for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she otherwise would be entitled to, should be received by him;”<sup>5</sup> and even in cases where she is entitled to an account against him for such receipts, the general rule seems to be, that he shall be obliged to account for one year's receipts only.<sup>6</sup> But as regards the capital or corpus of the separate estate, the wife may dispose of same to her husband, only if she is not restrained from anticipation.

In any case, she is entitled to only one year's account.

<sup>1</sup> Newlands v. Paynter, 4 My. & Cr. 408; Humphrey v. Richards, 2 Jur. N. S. 432.

<sup>2</sup> Re Sharp, 3 Pub. Div. 76.

<sup>3</sup> Barrack v. M'Culloch, 3 Kay & J. 110.

<sup>4</sup> Wright v. Wright. 2 J. & H. 647, stated *infra* in this section.

<sup>5</sup> Caton v. Ridcutt, 1 Mac. & G. 601; Rowley v. Unwin, 2 K. & J. 138; Dixon v. Dixon, 9 Ch. Div. 587.

<sup>6</sup> Lewin Tr. 549; Peachey on Settlements, 281; but see Darkin v. Darkin, 17 Beav. 578.



If a *feme covert*, having personal estate settled to her separate use, die without disposing of it, the husband will be entitled to it; and all those parts thereof that consist of cash, furniture, or other personal chattels, or of chattels real,<sup>1</sup> he will take in his marital right,<sup>2</sup> and all such parts thereof as consist of "choses in action," he will be entitled to take as her administrator,<sup>3</sup> and in either case for his the husband's own benefit, although as regards the choses in action (and *quære*, also as regards the property which he takes *jure mariti*) subject to his wife's debts.

Husband takes separate personal estate undisposed of.

*Jure mariti*.

Or as her administrator.

Although a man having a general power of appointment over property, which in default of appointment, goes to others, by exercising his power makes the appointed property assets for payment of his debts, in an administration of his estate after his death,<sup>4</sup> yet it has been held, that if a married woman exercises such a power, the appointed property will not be applicable to the payment of her debts in such an administration of her estate.

Property subject to a general power of appointment.

This distinction is based upon the difference between property and power. A power of appointment in a married woman is a very different thing from property itself, even when settled to her separate use. Separate use is purely a creature of equity, and utterly unknown to the common law; whereas, that a married woman has the right and capacity to exercise a power of appointment, is as much the doctrine of a court of law, as it is of a court of equity. It is not necessary she should be regarded as a *feme sole* in order to do that.

Differences between separate property and general power of appointment in a married woman. (a.) Separate property not recognized at common law. But married woman's right to execute a power of appointment recognized both at law and in equity.

<sup>1</sup> Co. Litt. 36 b.; Dyer, 251.

<sup>2</sup> Molony v. Kennedy, 10 Sim. 254; Johnston v. Lumb, 15 Sim. 308.

<sup>3</sup> Proudley v. Fielder, 2 My. & K. 57.

<sup>4</sup> Jenney v. Andrews, 6 Mad. 264.

(b.) *Feme covert* cannot contract a debt to bind her appointment property; but *secus*, as regards her separate property, see *infra*.

In case of her fraud, her property generally being liable, a fund appointed by her under a general power is also liable, at least where as in *London Chartered Bank v. Lempriere*,—the power of appointment is rather an incident of the separate estate than a power additional to it.

And although in equity she is a *feme sole* as regards her separate estate, and may contract by express agreement a debt payable out of that property, she cannot, it was said, by mere contract, incur a debt payable out of her property, over which she has a mere power of appointment, because she cannot contract a debt except to the extent of such property as is settled to her separate use; therefore her ordinary creditors have no right to be paid out of the fund which she appointed.<sup>1</sup> But, notwithstanding the incapacity of a married woman to incur a debt merely by contract, yet it is well established that a married woman is capable of committing a fraud, and is liable to be visited with the consequences of the commission of such fraud;<sup>2</sup> that by fraud she renders her general property liable; and further, that, if it be sufficient, then, as in the case of a *feme sole*, or a man, the appointed fund becomes liable to supply any deficiency.<sup>3</sup> The doctrine that property subject to a married woman's power of appointment is not liable for the payment of debts, appears to have been considerably modified, if not entirely overruled, by the decision of the Privy Council in the recent case of *The London Chartered Bank of Australia v. Lempriere*.<sup>4</sup> There Mrs. Aitkin was entitled to large personal estate, settled to her separate use with remainder as she should by will or deed appoint. *She was not restrained from anticipation*. At the request of her bankers she gave them a letter, charging her interest (which was comprised in the settlement) in a fund standing to her credit as administratrix of her late husband, as a security for overdrafts on her

<sup>1</sup> *Shattock v. Shattock*, L. R. 2 Eq. 186.

<sup>2</sup> *Savage v. Foster*, 9 Mod. 35; *Blain v. Terryberry*, 11 Cr. 286.

<sup>3</sup> *Vaughan v. Vanderstegen*, 2 Drew. 165. 363; *Shattock v. Shattock*, L. R. 2 Eq. 182.

<sup>4</sup> L. R. 4 P. C. 572.

private banking account. Mrs. Aitkin subsequently made her will in execution of the power, and died largely indebted on her private account, whereupon a suit was brought to charge her interest in the fund. The cases of *Vaughan v. Vanderstegen* and *Shattock v. Shattock* were cited to show that the corpus could not be liable, but James, L. J., in delivering the judgment of the court, decided in favor of the bank. His Lordship there said,—“In the present case it is to be noted that the gift is to the married woman for her separate use for life, with remainder as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors or administrators. Their Lordships are satisfied that on the weight of authority and on principle they ought to treat this as what it is in common sense, and to common apprehension it would be, *an absolute gift to the sole and separate use of the lady*. The words are an expansion and expression of what would be implied in the words sole and separate use; and their Lordships conceive themselves at liberty to hold that such a form of gift to a married woman, *without any restriction on anticipation*, vests in equity the entire corpus in her for all purposes, as fully as a similar gift to a man would vest it in him.” It will be observed that in this case the power of appointment, which was by *deed or will* had been exercised by will, though on the grounds of the decision as above cited it would appear that actual execution of the power was not necessary to render the fund liable to satisfy the claim of the bank. In the similar case of *Heatley v. Thomas*,<sup>1</sup> cited with approval in the judgment, the power was exercisable by will only.

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<sup>1</sup> 15 Ves. 596.

Though generally regarded as a *feme sole* in equity as to her separate estate, she could not originally bind her separate estate with debts.

Although from an early period, courts of equity had so far departed from the settled rules of law with respect to a *feme covert*, as to admit of property being settled in trust for her separate use, and had established the principle that with respect to property so settled, she should be considered a *feme sole*, *quoad* the capacity of enjoining and the capacity of disposing of that property; it is remarkable how long and steadily they refused to grant to her the other capacity of a *feme sole*, that of contracting debts binding upon the property. It might very reasonably be considered that consistency required that she should have that capacity to the same extent that she was constituted a *feme sole*. After a time, however, being pressed by the injustice of allowing her, after having solemnly and deliberately entered into an engagement for the payment of money, to continue in the enjoyment of her separate property without paying her creditors, the courts, at first, ventured so far as to hold, that if she made a contract for payment of money by a written instrument, with a certain degree of formality and solemnity, as by a bond under her hand and seal,<sup>1</sup> in that case, the property settled to her separate use should be made liable to the payment of it; and this principle, if principle it could be called, was subsequently extended to instruments of a less formal character, such as to bills of exchange,<sup>2</sup> or promissory-notes,<sup>3</sup> and ultimately to any written agreement.<sup>4</sup>

Successive relaxations of this rule.

(1.) Her separate estate was bound by an instrument under seal.

(2.) By bill or note.

(3.) By ordinary written agreement.

<sup>1</sup> Hulme v. Tenant, 1 Smith L. C. 525; Heatley v. Thomas, 15 Ves. 596.

<sup>2</sup> Stuart v. Kirkwall, 3 Mad. 387; Owen v. Homan, 4 H. L. Cas. 997; M'Henry v. Davies, L. R. 10 Eq. 88.

<sup>3</sup> Bulpin v. Clarke, 17 Ves. 365; Field v. Sowle, 4 Russ. 112.

<sup>4</sup> Master v. Fuller, 1 Ves. Jr. 513; Murray v. Barlee, 3 My. & K. 209; Picard v. Hine, L. R. 5 Ch. App. 274.

But still the courts refused to extend it to a verbal agreement, or other common assumpsit; and even as to those more formal engagements which they did hold to be payable out of the separate estate, they struggled against the notion of their being regarded *as debts*, and for that purpose they invented reasons to justify the application of the separate estate to their payment, without recognizing them as debts, or letting in verbal contracts. One suggestion was, that the act of disposing of, or charging, separate estate by a married woman, was in reality the execution of a power of appointment, and that a formal and solemn instrument in writing would operate as an execution of the power, which a mere assumpsit would not do.<sup>1</sup> The fallacy of this reasoning has been repeatedly exposed, and it has been truly observed:—1st, that it confounds two things which are quite distinct in their nature, —power and separate use; 2d, that even supposing the act of disposing of separate estate by a married woman to be regarded as the execution of a power, the reason assigned violated the principle long established with respect to powers, that a power could not be executed by an instrument which did not refer either to the power itself, or to the property which was the subject of it; and 3d, that if there be several of such instruments, and they are to be regarded as successive executions of a power, the appointees would rank in the date of the order of their appointments, whereas it is held that where the persons claiming under such instruments are let in upon the separate property of the party executing them, they must stand *pari passu*. Another reason suggested was, that as a married woman has the right and capacity specifically to charge her sep-

(4.) And last of all, after a final struggle, by her ordinary parol or simple contracts.

Erroneously held that charging the separate estate was executing a power of appointment.

Power and separate property confounded.—although different, because,—

(c.) Appointees under a power rank in order of time, while creditors of separate estate take *pari passu*.

<sup>1</sup> Murray v. Barlee, 3 My. & K. 223; Owen v. Dickenson, 1 Cr. & Ph. 53.

arate estate, the execution by her of a formal written instrument must be held to indicate an intention to create such special charge, because otherwise it could not have any operation.<sup>1</sup>

Courts now hold that to the same extent that she is regarded as a *feme sole*, she may contract debts.

The inconsistency of drawing this distinction between the different engagements of a married woman having separate estate, with reference to the different forms in which they are contracted, together with the unsatisfactory character of the reasons assigned to justify such distinction, has forced itself more and more on the attention of successive judges; and a growing tendency has been manifested to adopt a more consistent course, by holding, 1st, That to the same extent to which a married woman is, by courts of equity, constituted a *feme sole* with respect to the capacity of disposing of property, she ought also to be regarded as a *feme sole* with respect to the capacity of contracting debts, or engagements in the nature of debts; and 2d, As a corollary of the former, that all such debts or engagements should stand on the same footing, in whatever form contracted.<sup>2</sup> And, in fact, it may now be considered as settled, that her separate estate may be rendered liable on an assumpsit or verbal engagement. For Kindersley, V.-C., in *Matthewman's case*,<sup>3</sup> says:—"It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal engagement, expressly making her estate liable, such contract would bind it; nor is it necessary that there should

Her verbal engagements now binding on her separate estate.

<sup>1</sup> Murray v. Barlee, 3 My. & K. 223.

<sup>2</sup> Vaughan v. Vanderstegen, 2 Drew. 182.

<sup>3</sup> L. R. 3 Eq. 787; see also Mayd. v. Field, L. R. 3 Ch. Div. 587; Davies v. Jenkins, L. R. 6 Ch. Div. 728; Collett v. Dickenson, W. N. 1879, 80.

be an express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable,<sup>1</sup> provided she be not restrained from anticipation.<sup>2</sup> If the circumstances are such as to lead to the conclusion that she was contracting not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation."

[In the United States the English rule as to the power of a married woman over her separate estate and its liability for her contracts has been generally followed. "Unless specially restrained by the instrument creating the separate estate, a married woman is with respect to that estate a *feme sole* in equity, and may dispose of the estate in any way she please; and a specification in the deed of settlement of particular modes in which she may dispose of the estate will not of itself restrain her from disposing of it in any other manner."<sup>3</sup> This rule has been followed in the Federal Courts," and in the courts of all the States except South Carolina,<sup>4</sup> Pennsylvania,<sup>5</sup> Alabama,<sup>6</sup> Illinois,<sup>7</sup> Rhode Island,<sup>8</sup> Mississippi,<sup>9</sup> Tennessee,<sup>10</sup>

<sup>1</sup> L. J. Turner's remarks in *Johnson v. Gallagher*, 3 De G. F. & J. 494.

<sup>2</sup> *Atwood v. Chichester*, 3 Q. B. Div. 722.

[<sup>3</sup> *Jaques v. Methodist Episcopal Church* 17 Johns. 548.]

[<sup>4</sup> *Ewing v. Smith*, 3 Dessau, 417; *Reid v. Lamar*, 1 Strobb. Eq. 27.

[<sup>5</sup> *Lancaster v. Dolan*, 1 Rawle, 231; *West v. West*, 10 S. & R. 445; *Jones' Appeal*, 7 P. F. Smith, 367.]

[<sup>6</sup> *Short v. Battle*, 52 Ala. 456.]

[<sup>7</sup> *Cookson v. Toole*, 56 Ill. 515; *Bresler v. Kent*, 61 Ill. 426. In the last three States viz: Pennsylvania, Alabama, and Illinois, a distinction is taken between the statutory separate estate and the separate estate created by equity.]

[<sup>8</sup> *Metcalf v. Cook*, 2 R. I. 355.]

[<sup>9</sup> *Doty v. Mitchell*, 9 S. & M. 435.]

[<sup>10</sup> *Marshall v. Stephens*, 8 Huniph. 159.]

and perhaps Ohio,<sup>1</sup> in which States a *feme covert* is held to have no power over her separate estate except such as is given her by the trust instrument, which must be strictly construed.

So as to her debts and engagements. The States mentioned as following the English rule as to her power of disposing of her separate estate follow it also as to her power to bind it by her contracts—it being held in one of them that when a married woman gives a promissory note, the law implies in the absence of proof to the contrary an intention to bind her separate estate;—and that an intention not to bind it, to avail must appear on the face of the instrument.<sup>2</sup> But South Carolina and the States just mentioned as holding a contrary doctrine as to the power of a married woman to convey her separate estate have also refused to adopt the above rule as to her power to bind it by her contracts.]

The extent of the relief afforded by equity against the separate estate of a *feme covert* is thus laid down by Lord Thurlow in *Hulme v. Tenant*:<sup>3</sup> “Determined cases seem to go thus far, that the general engagement of the wife shall operate upon her *personal property*, shall apply to the *rents and profits of her real estate*. . . I know of no case where the *general engagement* of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance* of that real estate and by *sale, mortgage*, or otherwise, raise the money to satisfy that general engagement on the part of the wife.<sup>4</sup> But, of course, the creditors may have execution against both the real and the personal estate

General engagements bind—the *corpus* of her personality—rents and profits of her realty.

Execution against separate estate.

[<sup>1</sup> *Machir v. Burroughs*, 14 Ohio St. 519.

[<sup>2</sup> *Kimm v. Weippert*, 46 Mo. 532.]

<sup>3</sup> 1 Smith L. C. 526.

<sup>4</sup> *Francis v. Wigzell*, 1 Mad. 258; *Aylett v. Ashton*, 1 My. & Cr. 105, 112.



of the married woman during her life; and after her death they may file a bill against her representatives for the administration of her separate estate, which will be treated as equitable assets."<sup>1</sup>

Bill for administration of separate estate.

It has been seen that when first property was permitted to be settled to the separate use of a married woman, equity viewed her as a *feme sole* to the extent of having dominion over the property. It was, however, soon found that this concession to the requirements of justice, though useful and operative in securing to her a dominion over the estate so devoted to her support, was open to the difficulty, that she being at liberty to dispose of it (as a *feme sole* might have disposed of it) was nevertheless left exposed to the persuasion or other mode of influence of her husband, which was often found to defeat the very purpose for which her separate property was given her. To meet, therefore, this further difficulty, a provision was adopted of prohibiting the anticipation of the income, so that the wife should have no dominion over it till the payments actually became due.<sup>2</sup> And this mode of settlement was supported on the following reasoning:—That separate estate is purely a creature of equity, devised for the protection of married women, and that being such, equity has a right to act upon its own creature, and to modify it so as to further the object for which separate estate was first created.<sup>3</sup> It was for some time thought that a similar fetter might be imposed on property enjoyed by men, without relation to the married state, but Lord Eldon, in *Brandon v. Robinson*,<sup>4</sup> decided that in the case of

Origin of restraint on anticipation.

*Feme covert* prohibited against taking the income before actually due.

A man or *feme sole* cannot be so prohibited.

<sup>1</sup> *Owens v. Dickenson*, 1 Cr. & Ph. 48; *Gregory v. Lockyer*, 6 Madd. 90.

<sup>2</sup> *Pybus v. Smith*, 3 Bro. C. C. 339.

<sup>3</sup> *Tullet v. Armstrong*, 1 Beav. 22.

<sup>4</sup> 18 Ves. 429.

disposition to a man, the *jus disponendi* cannot be taken away from him by a mere prohibition against alienation. The fact is, that any such attempted restraint on alienation in the case of a man would be void for inconsistency or repugnancy, but *the restraint on anticipation is consistent with and in furtherance of the very object of the separate estate of a married woman*, and so can be (and has been) permitted to be good. But for this consistency of the two, equity could not have permitted the device of restraint to succeed; for, of course, equity cannot, any more than law, make valid what is void *in se* for repugnancy.

The restraint attaches to future covertures

The power of courts of equity to impose restraints upon the alienation by married women of their separate property having been established, the question next arose as to whether these restraints were to be confined to an actually existing coverture, or might be extended to take effect upon a future marriage. After some wavering of opinion, it was eventually determined in *Tullet v. Armstrong*,<sup>1</sup> that the restriction attached to a subsequent marriage. The Master of the Rolls, in that case, lays down the following general propositions on the nature and effect of the clause in restraint of anticipation:—

General rules.

(1.) She has a *jus disponendi* over her separate property.

“If the gift be made for her sole and separate use without more, she has, during her coverture, an alienable estate independent of her husband.

(2.) If restrained, she is entitled to the present enjoyment exclusively.

“If the gift be made for her sole and separate use, without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate independent of her husband.

(3.) Separate estate with or without restraint a

“In either of these cases she has, when discoverd, a power of alienation; *the restraint is annexed to*

<sup>1</sup> 1 Beav. 1; and see *In re Ridley*, *Buckton v. Hay*, 10 Ch. Div. 645.

*the separate estate only, and the separate estate has its existence only, during coverture; whilst a woman is discovert, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising upon the happening of a marriage.* The restriction cannot be considered distinctly from the separate estate, of which it is only a modification; to say that the restriction exists is saying no more than that the separate estate is so modified. \* \* \* If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does, exist without the restriction, but the restriction has no independent existence; when found, it is a modification of the separate estate, and inseparable from it.”<sup>1</sup>

exists only during coverture.

(4.) Restraint on alienation depends on, and is a modification of, separate estate, and has no independent existence.

It seems to result briefly from the preceding quotation, as follows:—First, That while a spinster, the female entitled for her separate estate, without power of anticipation, may anticipate the entirety or any part of her estate; but that immediately upon her marriage (No. 1), the separate estate, and with it the restraint on anticipation, attach and endure during that coverture; and that upon her widowhood (No. 1) both the separate estate and the restraint dis-attach; and again upon her subsequent marriage (No. 2), and subsequent widowhood (No. 2), and so on *toties quoties*, attaching and dis-attaching, and re-attaching and again dis-attaching, according as she is covert or not from time to time, and for the time being.

General conclusion.

[The rule in *Tullet v. Armstrong* has been adopted here, except in Pennsylvania, Arkansas and North Carolina.<sup>2</sup>]

<sup>1</sup> *Woodmeston v. Walker*, 2 Russ. & My. 197.

<sup>2</sup> *Hammersly v. Smith*, 4 Whart. 126; *Lindsay v. Harrison*, 3 Eng. 311; *Apple v. Allen*, 3 Jones Eq. 120.]

In what cases the trust will be wholly destroyed, so as not to attach on marriage.

Inasmuch as a woman, when discover, has full power of alienation over her separate estate, even though coupled with a restraint against anticipation or alienation, the question sometimes arises, whether the lady has not, by her intervening acts during discover, acquired the property unfettered or unrestricted by any trust or restraint, so that neither would attach or re-attach upon her marriage, as they would have done in the absence of such acts. Thus, in *Wright v. Wright*,<sup>1</sup> stock was bequeathed a woman upon trust for her separate use, without power of anticipation, but without the intervention of trustees; she afterwards, being discover and *sui juris*, sold the stock, spent a portion of the proceeds, and invested the rest in shares of a joint-stock bank and Canada bonds. *Held*, that by doing so she had determined the trust for her separate use.

If property remained *in statu quo*, husband must take it with the trusts impressed upon it.

Wood, V.-C., said:—"Had she allowed the property to remain *in statu quo*, had she left it until her marriage in the form of investment in which it was bequeathed to her by her parents, then according to *Newlands v. Paynter*,<sup>2</sup> the husband must have been considered as adopting the property in the state in which they left it, and subject to the trusts that, while in that state, they had impressed upon it. But she did not leave it in that form; having the sole ownership of the property, and being single and *sui juris*, she sold it and received the purchase-money. When the property was in her hands as money, it was absolutely hers, as if it had never been fettered by any trust whatever. By selling the property, she disposed of it finally and entirely."<sup>3</sup>

But if she sell it, and receive the purchase-money, the trust is destroyed.

<sup>1</sup> 2 J. & H. 647.

<sup>2</sup> 4 My. & Cr. 408.

<sup>3</sup> *Buttanshaw v. Martin*, Johns. 89.

The effect of disposing of the *corpus* here stated is, of course, to be distinguished from the effect already stated in a previous page of disposing of the savings of income in the purchase of investments, and the subsequent variation of such investments.<sup>1</sup> It has been held that a married woman, although restrained from anticipation, may bar an estate tail,<sup>2</sup> or accept payment out of court,<sup>3</sup> neither of these acts involving any anticipation.

As in the case of the separate use, so in the case of restraint on anticipation, no particular form of words is necessary to restrain alienation, if the intention be clear. Thus, when property was settled and it was directed that the trustee should, during the lady's life, receive the income "when and as often as the same should become due," and pay it to such persons as she might from time to time appoint, or to permit her to receive it for her separate use; and that her receipts, or the receipts of any person to whom she might appoint the same *after it should become due*, should be valid discharges for it; it was held that she was restrained from anticipating the income.<sup>4</sup> So also where property is given to the separate use of a married woman, "not to be sold or mortgaged," she will take with a restraint on alienation.<sup>5</sup>

On the other hand, where a testator bequeathed a sum of stock in trust for the separate use of his wife for her life, and directed that it "should remain during her life, and be, under the orders of the trustees, made a duly administered provision

What words will restrain alienation.—*Field v. Evans.*

What words will not restrain alienation.—*Parkes v. White.*

<sup>1</sup> *Barrack v. M'Culloch*, 3 Kay & J. 110.

<sup>2</sup> *Cooper v. Macdonald*, 7 Ch. Div. 288.

<sup>3</sup> *In re Crompton's Trusts*, 8 Ch. Div. 460.

<sup>4</sup> *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 7 De G. M. & G. 597.

<sup>5</sup> *Steedman v. Poole*, 6 Ha. 193; *Baggett v. Meux*, 1 Coll. 188.

for her, and the interest given to her *on her personal appearance and receipt*," by any banker the trustees might appoint, it was held that the widow, who had married again, was not restrained from alienating her interest in the stock.<sup>1</sup> Where expressions are used giving the wife a right to receive separate property "with her own hands from time to time," or so that her receipts "alone, for what should be actually" paid into her own proper hands should "be good discharges," they are, to use the words of Lord Eldon in an *unfolding* of all that is implied in a gift to the separate use.

Married Women's  
Property Act,

Such being the rights and liabilities of married women arising from the equitable doctrine of separate estate; [modern statutes in nearly all the States have made most radical changes in the common law relations of married women to their property, and have incidentally enlarged the jurisdiction of equity. \* \* \* These States may be divided into two groups, the legislation of each group following the same general type. By the first type the property of a married woman is declared to be her separate property free from any interest or control of her husband and not liable for her debts, but the statute contains no provision expressly authorizing her to make contracts. By the second type all the wife's property is likewise declared to be her own separate property free from all claims of her husband, she furthermore possesses the sole power to manage it, may sell and convey it, and may make contracts in relation to it, but these contracts are not declared to be personally binding on her at law.<sup>2</sup>]

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<sup>1</sup> In re Ross's Trust, 1 Sim. N. S. 196.

[<sup>2</sup> Pom. Eq. Jur. § 1099, note where a synopsis of the statutes may be found.]

## SECTION II.—PIN-MONEY AND PARAPHERNALIA.

I. Pin-Money may be defined as a yearly allowance settled upon the wife before marriage, for the purchase of clothes or ornaments, or otherwise for her separate expenditure; it is in order to deck her person suitably to the rank, and agreeably to the tastes, of her husband, who has accordingly an interest in its expenditure. It is a sum allowed for her personal expenses, in order to save a constant recurrence by the wife to the husband, upon every occasion of a milliner's bill or jeweller's account coming in—the jeweller's account, viz., not for the jewels, because that is a very different question, but for the repair and the wear and tear of trinkets—and for pocket-money, and the things of that sort; nor of course, does it mean the carriage, and the house, and the gardens, but the ordinary personal expenses.<sup>1</sup> Gratuitous gifts, or payments from time to time, made to the wife by her husband after marriage, for the same purposes, are also considered as pin-money.<sup>2</sup>

Pin-money. For wife's ornament and personal expenditure.

To save the constant recurrence of wife to husband for trifling expenses.

II. PARAPHERNALIA.<sup>3</sup>—The paraphernalia of the wife include such apparel and ornaments given to the wife as are suitable to her condition in life, and as are expressly given to be worn as ornaments of her person only.<sup>4</sup>

Paraphernalia include gifts to be worn as ornaments.

Jewels given to the wife by her husband after marriage will, it seems, be considered her paraphernalia, where they are given her expressly for the purpose of wearing them, as befitting her station in

<sup>1</sup> Howard v. Digby, 8 Bligh, N. S. 265.

<sup>2</sup> 2 Bright, H. & W. 288.

<sup>3</sup> The word paraphernalia is derived from the Greek word *parapherne*, i. e., property belonging to the wife over and above (*para*) the dower (*pherne*) which she brought to her husband.

<sup>4</sup> Graham v. Londonderry, 3 Atk. 394. [re Laveille, 7 Cent. L. J. 240.]

life.<sup>1</sup> But it would also appear that gifts from the husband to the wife may be made to her separate use, where they are given to her absolutely, and not merely to be worn as ornaments for her person.<sup>2</sup>

### SECTION III.—THE WIFE'S EQUITY TO A SETTLEMENT AND HER RIGHT OF SURVIVORSHIP.

Marriage a gift of wife's personal property to husband—both at law and in equity.

Marriage [at common law] is a gift to the husband of all the personal property, other than separate property, to which the wife is entitled at the time of the marriage, or to which she may afterwards become entitled, subject only to the condition (as regards any chose in action) of his reducing it into possession during the coverture; and no distinction exists, in this respect, between property to which the wife is entitled in equity and property to which she is entitled at law. *Prima facie*, then, the wife's property, whether at law or in equity, becomes the husband's. On what grounds, therefore, is the interference of equity derogating from the husband's legal rights, and compelling him to make a settlement on his wife, to be supported?

Her equity to a settlement does not depend on a right of property in her.

Firstly, it is safe to assert that her equity to a settlement does not depend on any right of property in her, and this position will appear the more clear when it is considered to what limitations her equity is subject. The amount is discretionary in the court, and if the wife insists upon it, she must claim it for herself and her children, and not for herself alone,—limitations which are wholly inconsistent with a right of property in her.<sup>3</sup>

<sup>1</sup> *Jervoise v. Jervoise*, 17 Beav. 571; *Graham v. Londonderry*, 3 Atk. 394.

<sup>2</sup> *Graham v. Londonderry*, 3 Atk. 394; *Grant v. Grant*, 13 W. R. 1057.

<sup>3</sup> *Osborne v. Morgan*, 9 Hare, 434.



The right being thus independent of property, there seems to be no ground, Secondly, on which it can rest, except the control which courts of equity exercise over property falling under their dominion. It is, in truth, the mere creature of equity deduced originally, where the husband sued, from the rule that he who comes into equity must do equity ; that is, the court refused its aid to the plaintiff-husband in seeking to acquire what the law would have given him if the court of common law had had jurisdiction in the matter : and as the court of law had no jurisdiction, he returned into the Court of Equity, which consented to lend him its aid only upon certain conditions which the court considered he ought to comply with, although the subject of the condition should be one which the court would not have otherwise enforced.<sup>1</sup> And inasmuch as a father would not have given his daughter in marriage without insisting on some provision being made for her and her children, so a court of equity standing, vaguely speaking, *in loco parentis* towards all married women, will not allow the husband to come into a court of equity for the fortune of his wife without his first making a provision for her.

Her equity arises from the maxim, "He who seeks equity must do equity."

The court imposes conditions on the husband coming as plaintiff.

The principle, after having been once thus far recognized where the husband was plaintiff, was next enforced where the assignees of a bankrupt or an insolvent husband were plaintiffs, upon the ground that the assignees, claiming in right of the husband, should be aided only upon the same conditions, as the court would have imposed upon the husband himself.<sup>2</sup> Subsequently the same rule was held to apply as against an assignee of the husband for valuable consideration being plaintiff. "It would be whimsical, then, that the assignment by

Principle extended to the husband's general assignees.

Then to particular assignees for value.

<sup>1</sup> Sturgis v. Champneys, 5 My. & Cr. 102.

<sup>2</sup> Oswell v. Prober, 2 Ves. Jr. 682.

Wife permitted  
to assert her right  
as plaintiff.

the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in. The guard of the court upon the wife's interest would be very singular if the husband, not being entitled at law, must assign it for a valuable consideration to another person, who would be entitled in equity."<sup>1</sup> Eventually, the principle was extended to suits instituted by the wife herself, and in *Elibank v. Montolieu*<sup>2</sup> it was decided that as to personalty, where it was perfectly clear that the subject-matter in controversy must be determined and decided upon and distributed in the Court of Chancery, there the wife might come to assert her equity, and need not wait until the defendant came into court to seek the court's aid in the matter.

[The modern legislation on the subject of the property of married women destroying as it does the husband's interest in the wife's property, and making it her own separate estate, has taken away the foundation of the equitable doctrine, and rendered it, so far as the present day is concerned, practically obsolete.<sup>3</sup> The foregoing section sufficiently presents to the student, the rise and history of this equitable doctrine.]

#### SECTION IV. — SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS.

Wife must not  
commit a fraud  
on the marital  
right.

It being a general rule of law and equity that a husband becomes entitled to the property of his wife on marriage, any alienation of property by her in fraudulent derogation of the marital rights will in equity be deemed null and void. In *Strathmore*

<sup>1</sup> Macaulay v. Philips, 4 Ves. 19; Scott v. Spashett, 3 Mac. & G. 599.

<sup>2</sup> 1 Smith L. C. 464. Robinson v. Robinson, 12 Ch. Div. 1880.

<sup>3</sup> Pom. Eq. Jur. § 1115 n.

v. *Bowes*,<sup>1</sup> Lord Thurlow thus states the rule;—"A conveyance by a wife, whatsoever, may be the circumstances, and even the moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud. If a woman, *during the course of a treaty* of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *prima facie*, because affected with that fraud."

Conveyance by wife *prima facie* good.

The cases decided on this subject support the following conclusions:—

1. If a woman entitled to property enters into a treaty for marriage, and *during the treaty represents to her intended husband* that she is so entitled; that upon the marriage he will become entitled *jure mariti*; and if *during the same treaty* she CLANDESTINELY conveys away the same property to a volunteer,<sup>2</sup> or settles the property upon herself, in such a manner as to defeat the marital right, *and the concealment continues until the marriage takes place*, there can be no doubt but that a fraud is practised in such a case on the husband, and he is entitled to relief.<sup>3</sup>

If during a treaty of marriage she alienes without husband's knowledge property to which she has represented herself entitled, it is fraudulent.

2. And not only is this principle applicable where the husband knew of the existence of her property, but it has been extended much further: for in *Godard v. Snow*,<sup>4</sup> a woman ten months before marriage, but after the commencement of that intimate acquaintance with her future husband which ripened into marriage, made a settlement of a sum of money *which he did not know her even to be possessed of*. The marriage took place, she concealing from him both her right to the money, and the existence of

Same principle applicable if he did not know her to be possessed of such property.

<sup>1</sup> 1 Smith L. C. 446.

<sup>2</sup> *Lance v. Norman*, 2 Ch. Rep. 79.

<sup>3</sup> *England v. Downes*, 2 Beav. 528.

<sup>4</sup> 1 Russ. 485.

the settlement. Ten years after, on her death, it was held on a bill filed by the husband, that the settlement was void, as a fraud upon his marital rights.<sup>1</sup>

Not fraudulent, if to a purchaser for valuable consideration without notice.

3. But when a woman about to marry; sells or conveys to a purchaser for valuable consideration, *without notice* of any intended derogation of the marital right, the sale or conveyance will be held good.<sup>2</sup> It seems uncertain, however, whether if the purchaser for value *have notice*, the sale or conveyance will stand as against the husband.<sup>3</sup>

Void, even though meritorious, if secret.

4. It would seem that a clandestine settlement made by a woman pending her marriage, even if meritorious in its nature, as on the children of a former marriage, or on her illegitimate children, will be set aside as a fraud on the husband.<sup>4</sup>

Marriage with notice of settlement binds husband.

5. If the intended husband is acquainted before his marriage with the fact of an assignment of property made by his intended wife, and nevertheless still thinks fit to marry her, he will be bound by it.<sup>5</sup>

A husband can only set aside a conveyance when made pending the marriage with him.

6. In all the cases it has been held that the settlement to be invalidated must have been made without the husband's knowledge, *during the course of the treaty for marriage* WITH HIM. It has been accordingly held that a settlement made by a widow upon herself and the children of a former marriage was not fraudulent, because it was proved that the person she afterwards married was not at the time of the settlement "her THEN intended husband."<sup>6</sup>

<sup>1</sup> *Downs v. Jennings*, 32 Beav. 290; *Taylor v. Pugh*, 1 Hare, 608.

<sup>2</sup> *Blanchet v. Foster*, 2 Ves. Sr. 264; *Lewell v. Cobbold*, 1 Sm. & Giff. 376.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Taylor v. Pugh*, 1 Hare, 608.

<sup>5</sup> *St. George v. Wake*, 1 My. & K. 610; *Wrigley v. Swainson*, 3 De G. & Sm. 458; *Sloccombe v. Glubb*, 2 Bro. C. C. 545; but see *Nelson v. Stocker*, 4 De G. & J. 458.

<sup>6</sup> *England v. Downs*, 2 Beav. 531.

And in *Strathmore (Countess) v. Bowes*,<sup>1</sup> the plaintiff pending a treaty of marriage with A., made a settlement of her property with his (A.'s) approbation; a few days after, B. gained her affections, and she threw over A., and married B., who had no notice of the settlement. It was, however, held good against B., as it could be no fraud on HIM, his brief period of courtship not having commenced at date.

7. Where the husband has before marriage seduced his wife, and thus rendered retirement from the marriage on her part extremely inconvenient, a settlement of her property made by the female before the marriage, although without her husband's knowledge, will, it seems, be supported.<sup>2</sup>

[Modern legislation before referred to has rendered these rules obsolete in most of the States.<sup>3</sup>]

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<sup>1</sup> 1 Smith L. C. 446.

<sup>2</sup> Taylor v. Pugh, 1 Hare, 608.

[<sup>3</sup> Ante. p. 338.]

## CHAPTER XXII.

## INFANTS.

Guardians.

Father.

Mother.

Who may be the guardians<sup>1</sup> of an infant.

1. The father is the guardian by nature and nurture of his children during their infancy.<sup>2</sup> But by 36 Vict., c. 12, the court may grant the custody of infants under the age of 16 years to the mother, where that is for the benefit of the infant.

Testamentary guardian.

2. By 12 Car. II., c. 24, a power was conferred upon the father of appointing, even though a minor, by deed or will, a guardian for his legitimate children; and guardians so appointed are usually called testamentary guardians. But by the Wills Act,<sup>3</sup> the power of making a will is taken from minors, but they may still appoint guardians for their children by deed.

A testamentary guardian is a trustee, and the Statute of Limitations is inapplicable to accounts as between him and his ward.<sup>4</sup>

<sup>1</sup> For the various kinds of guardians ancient and modern, see Brown's Dictionary, title Guardian.

<sup>2</sup> Wellesley v. Beaufort, 2 Russ. 21.

<sup>3</sup> 1 Vict., c. 26.

<sup>4</sup> Mathew v. Brise, 14 Beav. 341.

3. The father may waive his natural rights of guardianship in favor of a stranger, whom he has permitted to put himself *in loco parentis* towards his child. Where, therefore, under these circumstances, the stranger has provided for the maintenance and education of the child, and has appointed guardians, the father will be restrained in equity from asserting his parental rights *to the prejudice of his child's future interests*.<sup>1</sup> And where a father, having waived his right to have his child educated in his own religion, appointed a testamentary guardian, and such guardian sought to have the child brought up in the father's religion, notwithstanding that his previous education had been in the mother's religion, the court by injunction restrained the guardian from applying for the delivery up of the child by the mother to himself, upon the ground *that it was for the infant's benefit* to have his education continue as it had previously gone on.<sup>2</sup>

4. Guardian by appointment of the court. The origin of the jurisdiction of the Court of Chancery over infants has been a matter of much juridical discussion. The better opinion seems to be, that this jurisdiction has its just and rightful foundation in the prerogative of the Crown, flowing from its general power and duty as *parens patriae*, to protect those who have no other lawful protector.<sup>3</sup> Partaking, as it does, more of the nature of a judicial administration of rights and duties, *in foro conscientiae*, than of strict executive authority, it would naturally follow, *ea ratione*, that it should be exercised in the Court of Chancery, as a branch of the

Guardian appointed by stranger standing *in loco parentis*.

Guardian appointed by court.

Jurisdiction,—nature and origin of.

<sup>1</sup> *Powel v. Cleaver*, 2 Bro. C. C. 499.

<sup>2</sup> *Andrews v. Salt*, L. R. 8 Ch. 622. But see in *re Agar-Ellis*, 10 Ch. Div. 49.

<sup>3</sup> *De Manneville v. De Manneville*, 10 Ves. 63; and see *In re Johnsons Infants*, 8 Ch. Div. 1.

*general jurisdiction* originally confided and delegated to that court.

Infant becomes a ward of court when bill is filed relative to his estate.

If a bill be filed or action commenced relative to an infant's estate or person, the court acquires jurisdiction, and the infant, whether plaintiff or defendant, and even during the life of its father, or of its testamentary guardian, immediately becomes a ward of the court.<sup>1</sup>

Infant must have property that court may exercise its jurisdiction usefully.

The Court of Chancery will appoint a suitable guardian to an infant where there is none other, or none other who will or can act; but, as a general rule, it will not do so unless where the infant has property, although it may do so under exceptional circumstances.<sup>2</sup> It is not, however," as observed by Lord Eldon, "from any want of jurisdiction that it does not act where it has no property of an infant, but from a want of the means to exercise its jurisdiction, because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so—that is to say, by its having the means of applying property for the use and maintenance of the infant."<sup>3</sup>

Jurisdiction over guardians.

In general, parents are intrusted with the custody and education of their children, on the natural presumption that the children will, by their parents, be properly treated, and due care be taken of their education, morals and religion; but if the court has reasonable grounds for believing that the children would not be properly treated, it "would interfere even with parents, upon the principle that *prevent-*

<sup>1</sup> Butler v. Freeman, Amb. 303.

<sup>2</sup> See re Spence, 2 Phil. 247. [Wilcox v. Wilcox, 14 N. Y. 575; Miner v. Miner, 11 Ill. 43.]

<sup>3</sup> Wellesley v. Beaufort, 2 Russ. 21.



*ing* justice is preferable to *punishing* injustice.”<sup>1</sup>

But the court requires a strong case to be made out before it will interfere with a father’s guardianship.

Accordingly, where the father is insolvent,<sup>2</sup> or his character and conduct are such as are likely to contaminate the morals of his children,<sup>3</sup> or where he is endangering their property or neglecting their education,<sup>4</sup> or is guilty of ill-treatment and cruelty to them,<sup>5</sup> it is not a matter of course to take the father’s guardianship away, but if the danger to the children is proximate and serious, then the custody of the children will be committed to a person to act as guardian.<sup>6</sup>

When father loses his guardianship.

The guardian will be allowed to regulate the mode of, and to select the place for, the education of his ward, whose obedience will be enforced by the court.<sup>7</sup> And the court will aid guardians in obtaining possession of the persons of their wards when they are detained from them.

Guardian selects mode and place of education of his ward.

If the guardian wishes to take his ward out of the jurisdiction of the court, and in some other cases where there is danger of injury to the ward’s person or property, the court will always take security from the guardian before sanctioning his removal out of the jurisdiction.<sup>8</sup>

When guardian gives security.

<sup>1</sup> Wellesley v. Beaufort, 2 Russ. 21; In re Besant, 11 Ch. Div. 508.

<sup>2</sup> Kiffin v. Kiffin, 1 P. W. 785.

<sup>3</sup> Shelley v. Westbrook, Jac. 266 n.

<sup>4</sup> Cruze v. Hunter, 2 Cox, 242.

<sup>5</sup> Whitfield v. Hales, 12 Ves. 492.

<sup>6</sup> *Ex parte* Mountford, 15 Ves. 445; 36 Vict., c. 12.

<sup>7</sup> Hall v. Hall, 3 Atk. 721. See Tremain’s Case, 1 Str. 167, where “being an infant he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge, and the court sent a messenger to carry him from Oxford to Cambridge; and upon returning to Oxford, there went another, *tam* to carry him to Cambridge, *quam* to keep him there.”

<sup>8</sup> Jeffreys v. Vanteswarstwarth, Barn. Ch. R. 141; Biggs v. Terry, 1 My. & Cr. 675.

[In the United States the Probate Courts appoint guardians for infants and control their conduct. The jurisdiction of equity therefore, in this matter is really not exercised in most of the States except in the matter of relief against guardians at the suits of infants for their property or estates.<sup>1</sup>]

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<sup>1</sup> [Pom. Eq. Jur. § 78.]

## CHAPTER XXIII.

## LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND.

It is to be stated here at the outset that unsoundness of mind in itself gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is by law the guardian of infants, whom (as we have seen) it makes its wards; but it is not the curator of the person or of the estate of a person *non compos mentis*. And if the Court of Chancery in any case entertains proceedings affecting a person *non compos mentis*, it assumes the jurisdiction upon some ground independent of the unsoundness of mind, that is to say, upon such or the like grounds as it would think sufficient at the suit of the person himself if of sound mind, *e. g.*, upon the ground of a trust, or of a partnership, or such like.<sup>1</sup>

Clearly, therefore, it would be an error to suppose that the Court of Chancery, as such, has jurisdiction in lunacy; nor is any encouragement given to that error in the history of the jurisdiction of the

Unsoundness of mind is no ground for jurisdiction in equity.

The jurisdiction was in the Exchequer, upon inquiry.

<sup>1</sup> *Beal v. Smith*, L. R. 9 Ch. App. 85; *In re Edwards*, M'Neile v. Chambers, 10 Ch. Div. 605; *In re Currie*, 10 Ch. Div. 93. But see *Vane v. Vane*, L. R. 2 Ch. Div. 124, commented on in *Re Bligh*, 12 Ch. Div. 364. *Lulington v. Paser*, 12 Ch. Div. 333.

court, as stated in Part i., Chapter i., of this Hand-Book. It was there stated that the Court of Chancery, as a permanent tribunal, originated in 22 Edward III. by an ordinance of that king and in that year; but already long before that date the jurisdiction in lunacy was already in existence, and was at that time vested in the Court of Exchequer,<sup>1</sup> that court having special care of the Crown's prerogative in the matter of revenue, of which lunacy and idiocy were sources. This prerogative of the Crown was subsequently defined in the Statute of Prerogatives,<sup>2</sup> the 9th chapter of that statute relating to idiots, and the 10th chapter relating to lunatics. Under these two chapters of that statute the Crown acquired (in effect) the management of the estates of idiots and of lunatics, subject to the duty of maintaining the idiot or lunatic, as the case might be, during all the period of the mental incapacity, and rendering up the same estates to the representatives of the idiot upon his death and to the lunatic himself (upon his recovery), or to his representatives in like manner upon his death. There was practically little distinction in the Crown's management of the estates, whether of idiots or of lunatics, and the distinction (so far as any existed) has long since ceased. And at the present day whatever is stated of lunacy is commonly intended (as in the residue of this present chapter) of both lunatics and idiots indifferently, including also all persons whatsoever of unsound mind so found by inquisition.

Because a matter of revenue.

Exchequer jurisdiction in lunacy transferred to Lord Chancellor.

The jurisdiction of the Court of Exchequer in lunacy was very early superseded; and the jurisdiction was subsequently vested in divers courts and in divers officials, not profitable to specify here; but

<sup>1</sup> Mem. Scacc. Trin. 19 Edw. I.

<sup>2</sup> 17 Edw. II.

eventually the practice became a constant one of the Crown to delegate the care and custody of lunatics and of their estates to the Lord Chancellor, not as being the President of the Court of Chancery, but as being an executive officer of the highest standing in the realm and enjoying the most intimate personal relations with the Crown. The accident that he was also a great judicial officer, head of the Court of Chancery, and competent as an adviser in matters of law and equity affecting or which might possibly affect the lunatic as regarded his property and even his person, was a reason not without its own weight, which probably helped to permanently fix the jurisdiction in lunacy in the President of the Chancery Court.

[In the United States by statute, courts of equity are given jurisdiction over lunatics, idiots, drunkards, and persons unable to take care of their property. When a person under these statutes is "found" a lunatic or otherwise *non compos mentis*, a committee or guardian is appointed by the court.<sup>1</sup>]

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<sup>1</sup> Pom. Eq. § 1313.

## PART III.

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### *THE CONCURRENT JURISDICTION.*

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Origin of concurrent jurisdiction.

THE concurrent jurisdiction of courts of equity had its origin in this way,—either the courts of law, although they had a general jurisdiction in the matter, could not give adequate, specific, or perfect relief, or, under the actual circumstances of the case, they could not give relief at all. It often happened, *e. g.*, that a simple judgment for plaintiff or for the defendant did not meet the full merits and exigencies of the case, but a variety of adjustments, limitations, and cross claims had to be introduced and worked out, and a decree meeting all the circumstances of the particular case between the very parties was therefore indispensable to complete distributive justice. And it also often happened that the object sought, though treated as generally falling within a class of right cognizable by courts of law, was in the special instance, from special circumstances, or from the weakness of the common law, practically beyond the pale of its jurisdiction; as,

for instance, where a perpetual injunction, or a preventive process to restrain trespasses, nuisances, waste, was wanted. It might, therefore, be said that the concurrent jurisdiction of equity extended to all cases of legal rights, where, under the circumstances, there was not an adequate and complete remedy at law.

Concurrent jurisdiction extends to cases where there is not a plain, adequate, and complete remedy at law.

The subject of the concurrent jurisdiction may be divided into two branches :—

Division of the subject.

I. Cases in which the ground of action itself constitutes the principal foundation for the jurisdiction, *e. g.*, cases of accident, mistake, or fraud; and,

II. Cases in which the peculiar remedies afforded by courts of equity constitute the principal ground of the jurisdiction, *e. g.*, matters of suretyship, partnership, questions of account and set-off, specific performance, injunction, partition, &c.

These two several branches of the jurisdiction will be taken in the order above expressed. And under the first of them fall,—

1. Accident;
2. Mistake; and
3. Fraud, Actual and Constructive.

## CHAPTER I.

## ACCIDENT.

## Accident

By the term accident is intended in equity, not any inevitable casualty or act of Providence or *vis major*, i. e. irresistible force, but any unforeseen event, misfortune, loss, act, or omission which is not the result of negligence or misconduct in the party.<sup>1</sup>

To give equity jurisdiction there must be no complete legal remedy, and the party must have a conscientious title to relief.

But it is not every case of accident which will justify the interposition of a court of equity.<sup>2</sup> The jurisdiction being concurrent, will be maintained only, *first*, when a court of law cannot grant suitable relief; and *secondly*, when the party has a conscientious title to relief. Both circumstances must concur in any case to constitute a ground on which relief in equity may be craved. For it is certain that in some cases of accidents, courts of law can and always could afford adequate relief, as in cases of "loss of deeds, mistakes in receipts and payments, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies."<sup>3</sup>

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<sup>1</sup> [Simms v. Lyle, 4 Wash. C. C. 320.]

<sup>2</sup> Whitfield v. Fausset, 1 Ves. Sr. 392.

<sup>3</sup> 3 Bl. Com. 431.



The first consideration then, is whether there is an adequate remedy at law? not merely whether there is some remedy at law; and here a most material distinction is to be attended to. In modern times, courts of law frequently interfere and grant a remedy, under circumstances in which it would certainly have been denied by these same courts in earlier periods; and sometimes the Legislature, by express enactments, has conferred on courts of law the same remedial faculty which belongs to courts of equity. With reference to either of these cases, it is a fixed rule, that, if the courts of equity originally obtained and exercised jurisdiction over a particular subject-matter, that jurisdiction cannot be in any way affected, merely by the circumstance, that the common law courts have had conferred upon them a power to deal with such subject-matter, similar to that exercised by courts of equity. "It does not follow, because the court of law will give relief, that this court loses the concurrent jurisdiction which it always had."<sup>1</sup>

Is there an adequate remedy at law?

Courts of equity do not lose their jurisdiction because the common law courts have subsequently acquired it also.

I. The cases in which equity will give relief against accident fall conveniently into three groups, viz. the following:—

I. Cases in which equity relieves against accident

- (1.) Cases of lost and destroyed documents:
- (2.) Cases of the imperfect execution of powers; and,
- (3.) Cases of erroneous payments.

In the first of these three groups of cases, one of the most common interpositions of equity is in the case of bonds or other instruments under seal which have been *lost*. Until a very recent period, the doctrine prevailed that there could be no remedy on a *lost* bond in a court of common law, because there could be no *profert* or production of the instrument

First group of cases,—lost and destroyed documents.

(1.) Bonds, &c., being lost.

<sup>1</sup>Atkinson v. Leonard, 3 Bro. C. C. 222; British Empire Shipping Co. v. Somerset, 3 K. & J. 437; [Case v. Fishback, 10 B. Mon. 40.]

in court, in order that the defendant might demand *oyer* of it—that is, that it should be produced and read in open court.<sup>1</sup> At present, however, the courts of law do entertain the jurisdiction, and dispense with the *profert*, if an allegation of loss, by time and accident, is stated in the declaration.<sup>2</sup> But this circumstance is not permitted in the slightest degree to change the course in equity.<sup>3</sup>

Equity can grant relief by requiring an indemnity, which a court of law cannot do.

The original ground, therefore, of granting the relief was the supposed inability of a court of law to afford it in a suitable manner, from the impossibility of making a *profert*; but, independently of that ground for the original interference of equity, there was another satisfactory reason for the continuance of that interference, notwithstanding that courts of common law had jurisdiction over the subject-matter. A court of equity alone could give a complete remedy, with all the fit limitations which justice required, by granting relief only upon the condition that the plaintiff who sought its aid should give if necessary, a suitable bond of indemnity. Now a court of law was incompetent to require such a bond of indemnity as a part of its judgment, although it has sometimes attempted an analogous relief by requiring the previous offer of such an indemnity. But such an offer might in many cases fall far short of the just relief; for in the intermediate time there might be a great change in the circumstances of the parties to the bond of indemnity.<sup>4</sup> [Indemnity can indeed, be required in common law actions, especially in this country where not only equitable prin-

<sup>1</sup> The old practice of *profert* and *oyer* is abolished by the C. L. P. Act. of 1852; and is no longer required in America. *Fales v. Russell*, 16 Pick. 315. And see *Walmsley v. Child*, 1 Ves. Sr. 344.

<sup>2</sup> *Read v. Brookman*, 3 T. R.; 151 *Duffield v. Elwes*, 1 Bligh, N. S. 543; [*Almy v. Reed*, 10 Cush. 421.]

<sup>3</sup> *Kemp v. Pryor*, 7 Ves. 249, 250.

<sup>4</sup> See *England v. Tredegar*, L. R. 1 Eq. 622.

ciples but also equitable practice have been in many instances infused into the common law forms. Nevertheless the ability of courts of equity to require such a stipulation is undoubted and has been one of the grounds on which the jurisdiction in cases of accident has been supported.<sup>1]</sup>

But the loss of a title-deed was not always a ground to come into a court of equity for relief; for if there was no more in the case, although the party might be entitled to a discovery of the original existence and validity of the deed, courts of law might afford just relief, since they would admit evidence of the loss of a deed, just as a court of equity would do,<sup>2</sup> and upon proof of such loss secondary evidence of the contents of the deed and (if necessary) of its validity also, was admissible at law. To enable the party, therefore, in case of a lost title-deed, to come into equity for relief, he must have established that there was no remedy at all at law, or no remedy which was adequate and adapted to the circumstances of the case. Thus, he might come into equity when a title-deed of land had been destroyed, or else concealed by the defendant; for then, as the party could not know which alternative was correct, a court of equity would make a decree, which a court of law could not, that the plaintiff should hold and enjoy the land until the defendant should produce the deed or admit its destruction.<sup>3</sup> So, if a deed concerning land was lost, and the party in possession prayed discovery, and to be established in his possession under it, equity would relieve, for no remedy in such a case lay at law.<sup>4</sup> And where the plaintiff was out of possession, there

(2.) Title-deeds being lost.

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<sup>1</sup> Bisph. Eq. S. 177.

<sup>2</sup> Whitfield v. Fausset, 1 Ves. Sr. 392.

<sup>3</sup> Ibid. [Lawrence v. Lawrence, 42 N. H. 109.]

<sup>4</sup> Dalston v. Coatsworth, 1 P. Wms. 731.

were cases in which equity would interfere upon lost or suppressed title-deeds, and would decree possession to the plaintiff; but in all such cases, there must have been other equities calling for the action of the court.<sup>1</sup> Indeed, the bill must always have laid some ground besides the mere loss of a title-deed, or other sealed instrument, to justify a prayer for relief—as that the loss obstructed the right of the plaintiff at law, or left him exposed to undue perils in the future assertion of such right. And the like special grounds would still be necessary in such cases, and for obvious reasons, to found the equity jurisdiction.

(3.) Negotiable instruments being lost.

With reference to lost bills of exchange and other negotiable instruments, it was, after some conflict of authority, decided, that if a bill, note, or cheque, negotiable either by endorsement and delivery, or by delivery only, was lost, no action would lie at the suit of the loser against any one of the parties to the instrument, either on the bill or note itself, or on the consideration;<sup>2</sup> and the law was the same though the bill had never been endorsed.<sup>3</sup> In this case, therefore, the proper remedy was in equity, not only on the ground of there being no remedy at law, but also on account of the power equity possessed of compelling the plaintiff to give a proper indemnity to the defendant. And the jurisdiction of equity over such cases of lost bills was not taken away by the 17 & 18 Vict., c. 125, s. 87, which enacts, that in case of any action founded upon a bill of exchange or other negotiable instrument, the court of common law has power to order that the loss of such instrument shall not be set up, pro-

<sup>1</sup> *Dormer v. Fortescue*, 3 Atk. 132.

<sup>2</sup> *Hansard v. Robinson*, 7 B. & C. 90; *Crowe v. Clay*, 9 Exch. 604.

<sup>3</sup> *Ramuz v. Crowe*, 1 Exch. 167.

vided an indemnity is given to the satisfaction of the court against the claims of any other person upon such negotiable instrument.<sup>1</sup>

It seems to be doubtful whether or not, if a bill or note *not negotiable* be lost, an action will lie at law on the bill, or (failing that) on the consideration;<sup>2</sup> in equity, however, such a security may be assigned, and therefor an indemnity would be justly demandable, and this gives to equity sufficient ground for assuming the jurisdiction.

As to DESTROYED *negotiable* instruments, the weight of authority seems to support the conclusion that at common law, by the customs of merchants, the holder suing on the bill or note must, on payment, deliver up the bill or note, and cannot recover unless he do so, and he cannot do so when the instrument has been destroyed; but that he may in such a case recover on the original consideration, and that is enough.<sup>3</sup> Also, in the case of *Wright v. Maidstone*,<sup>4</sup> Wood, V.-C., held the courts of equity have never acquired jurisdiction to give relief on account of the *destruction* of a bill of exchange, because there was a complete remedy in such cases at law. With regard to DESTROYED *non-negotiable* instruments, the rule is the same as for negotiable instruments when destroyed.<sup>5</sup>

It is a general rule that the *non-execution* of a mere power will not be aided in equity.<sup>6</sup> But the rule is different where there is a defective execution of powers simply.

<sup>1</sup> King v. Timmerman, L. R. 6 C. P. 466.

<sup>2</sup> Byles on Bills, 374.

<sup>3</sup> Hansard v. Robinson, 7 B. & C. 95; Byles on Bills, 373.

<sup>4</sup> 1 K. & J. 708.

<sup>5</sup> Byles on Bills, 372.

<sup>6</sup> Arundell v. Phillpot, 2 Vern. 69; Bull v. Vardy, 1 Ves. Jr. 272.

of a power, resulting either from accident, mistake, or both, and also in regard to agreements to execute powers which may generally be deemed a species of defective execution.<sup>1</sup> Equity will relieve in such cases against the defective execution of a power, but only in favor of certain persons who are regarded by a court of equity with peculiar favor, and where there are no opposing equities in the case. The aid of equity will be afforded (1) to a purchaser,<sup>2</sup> which term includes a mortgagee and a lessee;<sup>3</sup> (2) to a creditor;<sup>4</sup> (3) to a wife;<sup>5</sup> (4) to a legitimate child,<sup>6</sup> for wives and children are in some degree considered as creditors by nature;<sup>7</sup> and (5) to a charity.<sup>8</sup> But it has been decided that a defective execution will not be aided in favor of the donee of the power,<sup>9</sup> nor of a husband,<sup>10</sup> nor of a natural child,<sup>11</sup> nor of a grandchild,<sup>12</sup> nor of remote relations, much less of volunteers;<sup>13</sup> and, in fact, in favor of no others than the five favored classes of persons above enumerated.

What defects in the execution of a power are aided.

As to the defects which will be aided, they may generally be said to be any which are not of the very essence and substance of the power. Thus, a defect by executing the power by will when it is

<sup>1</sup> Sugd. on Pow. 549.

<sup>2</sup> Fothergill v. Fothergill, 2 Freem. 257.

<sup>3</sup> Barker v. Hill, 2 Ch. R. 218; Reid v. Shergold, 10 Ves. 370.

<sup>4</sup> Pollard v. Greenvil, 1 Ch. Ca. 10; Wilkes v. Holmes, 9 Mod. 485.

<sup>5</sup> Cowp. 267; Clifford v. Burlington, 2 Vern. 379.

<sup>6</sup> Sarah v. Blanfrey, Gilb. Eq. R. 166; Sneed v. Sneed, Amb. 64; Bruce v. Bruce, L. R. 11 Eq. 371.

<sup>7</sup> Barnard, C. C. 107; Hervey v. Hervey, 1 Atk. 561.

<sup>8</sup> Innes v. Sayer, 7 Hare, 377; 3 Mac. & G. 659; Att-Gen. v. Sibthorp, 2 Russ. & My. 107.

<sup>9</sup> Ellison v. Ellison, 6 Ves. 656.

<sup>10</sup> Watt v. Watt, 3 Ves. 244.

<sup>11</sup> Tudor v. Anson, 2 Ves. Sr. 582.

<sup>12</sup> Watts v. Bullas, 1 P. Wms. 60.

<sup>13</sup> Smith v. Ashton, 1 Freem. 309.

required to be by deed or other instrument *inter vivos* will be aided;<sup>1</sup> but not *vice versa*, for if the power is required to be executed only by will, and it is executed by an absolute and irrevocable deed, no relief will be granted.<sup>2</sup> Nor will equity aid where the power is executed without the consent of parties who are required to consent to it,<sup>3</sup> unless when their consent has become immaterial or impossible to obtain. But equity will supply such defects as the want of a seal, or of witnesses, or of a signature, or defects in the limitations of the property.<sup>4</sup>

But we must be careful to distinguish between mere powers and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. Powers are never imperative, they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted.<sup>5</sup> But sometimes trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; in other words, the trust may have been vested in him under the garb or in the disguise of a power, but it is none the less for that a trust; and if he refuse to execute it, or die without having executed it, equity will interpose and give suitable relief, because his omission to do so by accident or design, ought not to disappoint the objects of the donor.<sup>6</sup>

(2.) Execution of powers in the nature of trusts, although left wholly unexecuted.

<sup>1</sup> Tollet v. Tollet, 1 Smith L. C. 254.

<sup>2</sup> Reid v. Shergold, 10 Ves. 370; Adney v. Field, Amb. 654.

<sup>3</sup> Mansell v. Mansell, cited in Scott v. Tyler, 2 Bro. C. C. 450.

<sup>4</sup> Chance on Powers, 2878, 2879, 2886, 2890. See 1 Vict., c. 26, s. 10, and 22 & 23 Vict., c. 35, s. 12.

<sup>5</sup> Wilm. 23.

<sup>6</sup> Warneford v. Thompson, 3 Ves. 513; Brown v. Higgs, 8 Ves 574. [Withers v. Yeadon, 1 Rich. Eq. 324.]

Third group of cases.

(1.) Accident in payment by executors or administrators.

In the course of administration of estates, executors and administrators often pay debts and legacies under a well founded belief that the assets are sufficient for all purposes. It may turn out, however, from unexpected occurrences, or from unsuspected debts and claims coming to light subsequently, that there is a deficiency of assets—for the payment even of the debts. Under such circumstances the executors used to be entitled to no relief at law. But in a court of equity, if they have acted with good faith and with due caution, they will be clearly entitled to relief, upon the ground that otherwise they will be innocently subject to an unjust loss from what the law itself deems an accident.<sup>1</sup> An executor or administrator stands in the condition in equity of a gratuitous bailee, and will not be charged without some default in him. Therefore, if any of the goods of the testator are stolen from the executor, or from the possession of a third person to whose custody they have been delivered by the executor, the latter shall not in equity be charged with these assets.<sup>2</sup> Again, if the goods be of a perishable nature, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself.<sup>3</sup>

(2.) A minor bound as apprentice, and master becomes bankrupt.

As another illustration of the doctrine of relief in equity upon the ground of accident, it may be stated, that if a minor is bound as apprentice to a person, and a large premium is given to the master, who becomes bankrupt during the apprenticeship, in such a case equity will interfere, and apportion

<sup>1</sup> Edwards v. Freeman, 2 P. Wms. 447; Hawkins v. Day, Amb. 160; St. 90.

<sup>2</sup> Jones v. Lewis, 2 Ves. Sr. 240.

<sup>3</sup> Clough v. Bond, 3 My. & Cr. 496; Wms. on Exors. 1666 1679.



the premium upon the ground of the failure of the contract from accident.<sup>1</sup>

II. It remains to consider, secondly, those cases of accident in which equity will not give relief. In the first place, in matters of positive contract and obligation created by the deliberate act of the parties, it is no ground for the interference of equity, that the party has been prevented from fulfilling them by accident; or that he has been in no default; or that he has been prevented by accident from deriving the full benefit of the contract on his own side. Thus, if a lessee on a demise covenants to pay rent, or to keep the demised premises in repair, he will be bound to do so in equity as well as in law, notwithstanding the destruction or injury of those premises by inevitable accident, as if they are burned by lightning, or destroyed by public enemies, or by other accident, or by overwhelming force.<sup>2</sup> The reason is, that he might have provided for such contingencies by his contract, if he had so chosen; and the law will presume an intentional general liability where he has made no exception.<sup>3</sup>

II. Cases where equity will not give relief.  
(1.) In matters of positive contract, —e. g., Absolute covenant to pay rent, not relieved against, upon destruction of demised premises.

And the like doctrine applies to the cases of contract where parties are equally innocent. Thus, for instance, if there is a contract for sale at a price to be fixed by an award, during the life of the parties, and one of them dies before the award is made, the contract fails, and equity will not enforce it upon the ground of accident; for the time of making the award is expressly fixed in the contract, according

(2.) Contracts where parties are equally innocent.

<sup>1</sup> Hale v. Webb, 2 Bro. C. C. 78.

<sup>2</sup> Bullock v. Dommitt, 6 T. R. 650; Brecknock Can. Co. v. Pritchard, 6 T. R. 750; Belfour v. Weston, 1 T. R. 310; Pym v. Blackburn, 3 Ves. 34, 38.

<sup>3</sup> Story 101. See also Bute (Marquis) v. Thompson, 13 M. & W. 487; Mellers v. Devonshire (Duke), 16 Beav. 252.

to the pleasure of the parties ; and there is no equity to substitute a different period.<sup>1</sup>

(3.) Where party claiming relief has been guilty of gross negligence.

In the next place, courts of equity will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault ; for in such a case, there is in fact no accident properly so called, as above defined, and a party has no claim to come into a court of justice, to ask to be saved from the consequences of his own culpable misconduct.<sup>2</sup>

(4.) Where party claiming relief has no vested right, but only a probability of a right.

Again, courts of equity will not interpose upon the ground of accident, where a party has not a clear vested right ; but his claim rests in mere expectancy, and is a matter not of trust, but of volition. As if a testator, intending to make a will in favor of particular persons, is prevented from doing so by accident, equity cannot grant relief ; for a legatee or devisee is a mere volunteer taking by the bounty of the testator, and has no independent right, until there is a title consummated by law.<sup>3</sup>

(5.) Equity will not aid one party where the other party has an equal equity.

In the next place, no relief will be granted in equity where the other party stands upon an equal equity, and is entitled to equal protection, as in the case of a *bona fide* purchaser for valuable consideration without notice.<sup>4</sup>

<sup>1</sup> Story 103; *Blundell v. Brettargh*, 17 Ves. 232-240; *White v. Nutts*, 1 P. Wins. 61; *Mortimer v. Capper*, 1 Bro. C. C. 156.

<sup>2</sup> *Ex parte Greenaway*, 6 Ves. 812.

<sup>3</sup> *Whitton v. Russell*, 1 Atk. 448.

<sup>4</sup> *Powell v. Powell*, Prec. Ch. 278; *Maldon v. Menill*, 2 Atk. 8.

## CHAPTER II.

## MISTAKE.

Mistake, as recognized and relievable against in a <sup>Mistake.</sup> court of equity, may be defined, in contradistinction from accident, as some unintentional act or omission arising from ignorance or surprise, and sometimes from imposition or misplaced confidence, but in the latter case it is not distinguishable from fraud.

This subject may be divided into two classes of cases—

I. Mistakes in matter of *law*.

II. Mistakes in matter of *fact*.

1. As to mistakes in matter of law, it is a well-known maxim that ignorance of the law is no excuse to any person either for breach or for an omission of duty,—*Ignorantia legis neminem excusat*—and this maxim is as much observed in equity as at law. The presumption is, that every one assuming to deal with his own property is acquainted with his rights to it or in it, provided he has had a reasonable opportunity of knowing them. And nothing can be more liable to abuse than to permit a person after parting with his property to reclaim it upon the mere pretence that, at the time of parting with it, he was ignorant of the law affecting his title. But the maxim applies, properly speaking, only to

I. Mistake of law,  
—as a general  
rule, not relievable.

*Ignorantia legis  
neminem excusat.*

the general law of the country,<sup>1</sup> and not therefore to ignorance of a private *jus* or right.

An agreement under a mistake of law binding.

An agreement entered into in good faith, though under a mistake of law will be held valid and obligatory upon the parties.<sup>2</sup> Thus, where a devise was made to a woman upon condition that she should marry with the consent of her parents, and she married without such consent, whereby a forfeiture accrued to other persons, and these latter persons afterwards executed an agreement respecting the estate, whereby the forfeiture was in effect waived, the court refused any relief. Lord Hardwicke said, "It is said they might know the fact (*i. e.*, of the marriage without consent) and yet not know the consequence in law; but if parties are entering into an agreement, and the very will out of which the forfeiture arose is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point, and shall not be relieved on pretence of being surprised, with such strong circumstances attending it."<sup>3</sup>

Cases in which equity relieves against a mistake of law.

Although it is clear that relief will not be granted in equity against a mistake in point of law, with full knowledge of all the facts, there are certain cases apparently exceptions to this general rule, and usually so classed, but, which, upon examination, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients going to establish misrepresentation, imposition, abuse of confidence, undue influence, mental

<sup>1</sup> Cooper v. Phipps, L. R. 2 H. L. 149, 170.

<sup>2</sup> [Hunt v. Rousmaniere, 8 Wheat. 174; 1 Pet. 1.]

<sup>3</sup> Pullen v. Ready, 2 Atk. 591; Irnham v. Child, 1 Bro. C. C. 92; Worrall v. Jacob, 3 Mer. 255.

imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief.<sup>1</sup>

Thus, it has been laid down as an unquestionable doctrine, that if a party, acting in ignorance of a clear and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effects of his mistake. Thus, if the eldest son, who is heir-at-law of all the undisposed of fee-simple estates of his ancestors, should, in gross ignorance of that rule of law, knowing, however, that he was the eldest son, agree to divide the estates with the younger brother, such an agreement would be held in a court of equity invalid, and relief would be granted. Here ignorance of a plain and established doctrine so generally known, and of such constant occurrence, as a common canon of descent, may well give rise to a *presumption that there has been some undue influence, imposition, mental imbecility, surprise or confidence abused*. But in such cases the mistake of law is not the foundation of the relief, but it is the medium of proof to establish some other proper ground of relief. And perhaps, in this case, the eldest son's ignorance of his being the heir-at-law may be considered a mistake of a fact as well as of law, and on that ground alone might entitle him to relief.<sup>2</sup>

Cases of surprise, combined with a mistake of law, also stand upon a ground peculiar to themselves. In such cases the agreements or acts are unadvised and improvident, and without due deliberation; and therefore they are held invalid upon the common principle adopted by courts of equity,

<sup>1</sup> Willan v. Willan, 16 Ves. 82.

<sup>2</sup> Broughton v. Hutt, 3 De G. & J. 501; and see remarks of Lord Westbury in Cooper v. Phipps, L. R. 2 H. L. 170.

to protect those who are unable to protect themselves, and of whom an undue advantage is taken.<sup>1</sup> Where the surprise is mutual there is of course a still stronger ground to interfere, for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts; or have pre-supposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist.<sup>2</sup>

Compromises,—  
upheld where a  
doubtful point of  
law.

But where the mistake arises not from ignorance of a plain and settled principle of law, but on a doubtful point of law, a compromise fairly entered into, with due deliberation and full knowledge, will be upheld in a court of equity as reasonable in itself, to terminate the differences by dividing the stake, and as supported by principles of public policy.<sup>3</sup>

Family compromises,—upheld if  
no *suppressio veri*,  
or *suggestio falsi*,  
but a full disclosure.

It is upon this ground that the whole doctrine of the validity of family compromises rests. The principle has been fully established that, when family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, each of the parties investigating the subject for himself, and each communicating to the other all he knows, and all the information which he has received on the question, then, although the parties may have greatly misunderstood their position, and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that

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<sup>1</sup> *Evans v. Llewellyn*, 2 Bro. C. C. 150; *Ormond v. Hutchinson*, 13 Ves. 51.

<sup>2</sup> *Willan v. Willan*, 16 Ves. 72, 81; *Cochrane v. Willis*, L. R. 1 Ch. 58.

<sup>3</sup> *Pickering v. Pickering*, 2 Beav. 56; *Gibbons v. Caunt*, 4 Ves. 849; *Naylor v. Winch*, 1 S. & S. 564. [*Stub v. Lee*, 6 Watts, 43.]

agreement.<sup>1</sup> "Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and especially where those doubts have related to a question of legitimacy, and fair compromises have been entered into to preserve the harmony and affection, or to save the honor, of the family, those arrangements have been sustained by this court, albeit, perhaps, resting upon grounds which would not have been considered as satisfactory if the transaction had occurred between strangers."<sup>2</sup> And these principles will apply whether the doubtful points, with reference to which the compromise has been made, are matters of fact or of law.<sup>3</sup> But in order that a transaction, not otherwise valid, may be supported upon the ground of its being a family arrangement, there must be a full and fair communication of all material circumstances affecting the subject matter of the agreement, which are within the knowledge of the several parties, whether such information be asked for by the other party or not.<sup>4</sup> "*There must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient.*"<sup>5</sup> And especially if parties are not on equal terms, and one of them stands in such a relation to the other as renders it incumbent on him to give a full account of the matter in dispute, to the utmost of his knowledge, and he omits to do so, the court, although no intentional fraud may be imputable to

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<sup>1</sup> Gordon v. Gordon, 3 Swanst. 463. [Shantel's Appeal, 14 P. F. Smith, 25.]

<sup>2</sup> Westby v. Westby, 2 Dr. & War. 503.

<sup>3</sup> Neale v. Neale, 1 Kee, 672; Westby v. Westby, 2 Dr. & War. 503.

<sup>4</sup> Greenwood v. Greenwood, 2 De G. J. & Sm. 28.

<sup>5</sup> Gordon v. Gordon, 3 Swanst. 400; De Cordova v. De Cordova, 4 App. Ca. 692.

such person, will not support a compromise entered into between the parties.<sup>1</sup>

Equity will not aid where position of parties has been altered.

And the disinclination of equity to set aside a family or other compromise entered into *bona fide*, and with a full disclosure of all facts known to either party, will be strengthened, where subsequent arrangements have taken place on the footing of such a compromise.<sup>2</sup> But where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual intoxication, and want of professional advice, courts of equity have manifested a strong disinclination to support a compromise, whether between members of a family or between strangers.<sup>3</sup>

*Secus*,—where gross ignorance or imposition.

Equity will not aid against a *bona fide* purchaser for value without notice.

It has been already stated that where a *bona fide* purchaser for valuable consideration, without notice is concerned, equity will not interfere to grant relief in favor of a party, although he has acted in ignorance of his title upon a mistake of law; for in such a case the purchaser has at least an equal right to protection with the party who has committed the mistake; and where the equities are equal, the court will not interfere between the parties.<sup>4</sup>

II.) Mistake of fact,—as a general rule relievable.

II. As to mistakes of fact, the general rule is that an act done, or contract made, under a mistake or in ignorance of a material fact, is voidable and relievable in equity; for it is not possible that any one can, by any amount of diligence, acquire a knowledge of all matters of fact. With reference to this subject, the following general propositions may be laid down:—

<sup>1</sup> *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Sturge v. Sturge*, 12 Beav. 229.

<sup>2</sup> *Clifton v. Cockburn*, 3 My. & K. 76; *Bentley v. Mackay*, 31 Beav. 143, 10 W. R. 873.

<sup>3</sup> *Dunnage v. White*, 1 Swanst. 137; *Persse v. Persse*, 7 C. & Fin. 318.

<sup>4</sup> *Malden v. Menill*, 2 Atk. 8.



1. The rule as to ignorance or mistake of a fact entitling the party to relief, is to be taken with this important qualification,—that the fact must be material to the act or contract; that is, that it must be essential to its character. For though there may be an accidental ignorance or mistake of a fact, yet, if the act or contract is not materially affected by it, the party claiming relief on that immaterial ground will be denied it. And the same principle is applicable though the mistake be mutual, as if a person should sell a message to another which was at the time swept away by a flood, without either party having any knowledge of the fact, equity would relieve the purchaser upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract.<sup>1</sup>

(a.) Principles on which relievable.  
1. Fact must be material.

2. It is not, however, sufficient in all cases to give the party relief, that the fact is material; but the fact must also be such as he could not by reasonable diligence get knowledge of, when he was put upon inquiry. For, if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.

2. Fact must be such as party could not get knowledge of by diligent inquiry.

3. In cases where one of the contracting parties has knowledge of a fact material to the contract which he does not communicate to the other, it is necessary, in order that the latter may set aside the transaction on the ground of such concealment, that the former should have been under an obligation, not merely moral, but legal or equitable, to make the discovery.

3. Party having knowledge must have been under an obligation to discover the fact.

4. Where the means of information are open to both parties, and where each is presumed to exercise

4. Where means of information are equally open to both, and no

<sup>1</sup> Hore v. Becher, 12 Sim. 465; Cochrane v. Willis, L. R. 1 Ch. 58. [Brown v. Lamphear, 35 Vt. 252; Henderson v. Dickey, 35 Mo. 120.]

confidence re-  
posed, no relief.

his own skill, diligence, and judgment with regard to a subject-matter, where there is no confidence reposed, but each party is dealing with the other at arm's length, equity will not relieve.<sup>1</sup> And, therefore, where the fact (not being a fact amounting to the entire subject-matter of the contract) is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a court of equity will not interpose.<sup>2</sup>

General sum-  
mary of the prin-  
ciples of relief.

The general ground upon which all these distinctions proceed is, that mistake or ignorance of facts in parties is a proper subject of relief only where it constitutes a material ingredient in the contract of the parties, or disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference.<sup>3</sup>

Oral evidence  
admissible to  
prove accident,  
mistake, or fraud.

It is a general rule of law that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law, or to give effect to a written instrument which is defective in any particular, which, by law, is essential to its validity; or to contradict, alter, or vary a written agreement, either appointed

[<sup>1</sup> Glenn v. Statier, 42 Iowa 182.]

<sup>2</sup> Mortimer v. Capper, 1 Bro. C. C. 158, 6 Ves. 24; Ainslie v. Medlycott, 9 Ves. 13.

<sup>3</sup> Jones v. Clifford, L. R. 3 Ch. Div. 779. [Paulison v. Van Indeirstine, 28 N. J. (Eq.) 306.]

by law or by the compact of private parties, to be the appropriate and authentic memorial of the particular facts which it recites.<sup>1</sup> But, upon principle, oral evidence is admissible to show that either by accident, mistake, or fraud, a written agreement has not been constituted the depository of the intention and meaning of the parties. To enforce the performance of an agreement under such circumstances would be the highest injustice—it would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake or accident, to resist the claims of justice, under shelter of a rule framed to promote it.<sup>2</sup>

The general rule, as to the admissibility of evidence in cases of mistake, may be thus stated:—Where, by mistake, an instrument *inter vivos* is not what parties intended, or there is a mistake in it, other than a mistake in law, and the mistake is clearly made out by admissible and satisfactory evidence, or is admitted by the other side,<sup>3</sup> or is evident from the nature of the case, or from the rest of the deed, equity will rectify the mistake.<sup>4</sup>

Courts of equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction. Thus, a partnership debt has been treated in equity as the several debt of each partner, though, at law, it is the joint debt of all; because in such cases, all have had a benefit from the money advanced, or the credit given, and the obligation to

Mistake implied from nature of the case.

<sup>1</sup> 3 Starkie on Ev. 753.

<sup>2</sup> Murray v. Parker, 19 Beav. 308.

<sup>3</sup> Davis v. Symonds, 1 Cox. 404; Russel v. Davy, 6 Gr. 165.

<sup>4</sup> Sm. Man. 49; Murray v. Parker, 19 Beav. 305; Fowler v. Fowler, 4 De G. J. & 250; Townshend v. Stangroom, 6 Ves. 333.

pay exists independently of any instrument by which the debt may have been secured. So where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay.<sup>1</sup>

Exception to last stated principle.

But where the inference of a several original debt or liability does not exist, a court of equity will not interfere unless there is evidence of mistake. The Master of the Rolls, in *Sumner v. Powell*,<sup>2</sup> thus expresses himself:—"It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. . . . *When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived.* . . . But in this case the covenant is purely a matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken. . . . It is not attempted to be shown that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. *There is nothing but the covenant itself by which its intended extent can be ascertained.* There is no ground, therefore, on which a court of equity can give it any other than its legal operation and effect."<sup>3</sup>

(b.) Cases in which equity relieves against mistake of fact.  
(L.) RECTIFICATION OF MISTAKES IN MARRIAGE SETTLEMENTS.

There is less difficulty in reforming written instruments where the mistake is mainly or wholly made out by other preliminary written instruments or memoranda of the agreement. This is strongly il-

<sup>1</sup> *Sumner v. Powell*, 2 Mer. 36; *Devaynes v. Noble*, 1 Mer. 538; and see *Kendall v. Hamilton*, 3 C. P. Div. 403, and on appeal 4 App. Ca. 504 (the true nature of a partnership debt.)

<sup>2</sup> 2 Mer. 36.

<sup>3</sup> *Richardson v. Horton*, 6 Beav. 187; *Underhill v. Horwood*, 10 Ves. 227-8; *Rawstone v. Parr*, 3 Russ. 424, 539.

lustrated in cases of marriage settlements. With reference to these, the following cases may occur:—

(*aa.*) Both the marriage articles, as well as the definitive settlement, may exist before the marriage. (*aa.*) Both marriage articles and settlement before marriage. In this case, if the articles and the settlement vary in their terms, the settlement will in general be considered the binding instrument, and will not be controlled by the articles, because, as observed in *Legg v. Goldwire*,<sup>1</sup> “When all parties are at liberty the settlement will be taken as a new agreement.”

(*bb.*) But where the settlement, though made before marriage, purports to be *in pursuance of the articles* entered into before marriage, and there is a variance, the settlement will be rectified in accordance with the articles.<sup>2</sup> (*bb.*) Where pre-nuptial settlement purports to be in pursuance of the articles.

(*cc.*) And even although a settlement made before marriage contains no reference to the articles, yet if it can be shown that the settlement was intended to be in pursuance of the articles, and there is clear and satisfactory evidence that the discrepancy has arisen from a mistake, the court will reform the settlement and make it conformable to the articles as expressing the real intention of the parties.<sup>3</sup> (*cc.*) Extrinsic evidence admissible to show that pre-nuptial settlement was made in pursuance of articles.

(*dd.*) Where the settlement is made after marriage it will, in all cases, whether purporting to be made in pursuance of the pre-nuptial articles or not, be controlled and rectified by them.<sup>4</sup> (*dd.*) Settlement after marriage.

In *Barrow v. Barrow*,<sup>5</sup> it was held that the erroneous belief by the husband and wife on their

<sup>1</sup> 1 Smith L. C. 17.

<sup>2</sup> *West v. Erisey*, 1 Bro. P. C. 225; *Bold v. Hutchinson*, 5 De G. M. & G. 568.

<sup>3</sup> *Bold v. Hutchinson*, 5 De G. M. & G. 558, 568; *Breadalbane v. Chandos*, 2 My. & Cr. 739.

<sup>4</sup> *Legg v. Goldwire*, 1 Smith L. C. 17; *Honor v. Honor*, 1 P. Wms. 123; *Mignan v. Parry*, 31 Beav. 211.

<sup>5</sup> 18 Beav. 529.

marriage that a particular property stood settled, was no ground for rectifying a settlement so as to make it include that property: "where a settlement has been executed which carried into effect a contract framed under a mistaken apprehension of the facts, and a marriage has been actually solemnized on the faith of that contract and that settlement, it would be to substitute a new contract between the parties, and not to carry the real contract into effect, if I were to alter the settlement."<sup>1</sup>

Mistake in marriage contracts must be of both parties.

The court will not correct an instrument made in consideration of marriage, except on evidence of the mistake of *both* parties. In a case<sup>2</sup> where the husband alone labored under a mistake, Kindersley, V.-C., said:—"The wife is bargaining for herself and her children, and the question always is, What is the contract on which the marriage took place? Here, so far as the wife's contract and understanding are concerned, the contract is the settlement as it stands, though the husband did not understand that it would affect his property."<sup>3</sup> Save and except in the case of marriage contracts, the mistake need not be that of *both* parties; the mistake of one will suffice.

(2.) Instrument delivered up or cancelled under a mistake.

Where an instrument has been delivered up or cancelled under a mistake of the party, and in ignorance of the facts material to the rights derived under it, a court of equity will in all cases grant relief, upon the ground that the party is conscientiously entitled to enforce such rights; and that he ought to have the same benefit as if the instrument were in his possession with its entire original validity.<sup>4</sup>

<sup>1</sup> Wilkinson v. Nelson, 9 W. R. 393.

<sup>2</sup> Sells v. Sells, 1 Dr. & Sm. 45.

<sup>3</sup> Thompson v. Whitmore, 1 J. & H. 268; Bradford v. Romney, 30 Beav. 431.

<sup>4</sup> East India Co. v. Donald, 9 Ves. 275.

As to the remedy offered by equity, in cases of defective execution of powers, arising from mistake, the same general principles are applicable as in cases of defective execution arising from accident.<sup>1</sup>

In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them when they are apparent upon the face of the will, or may be made out by a due construction of its terms, for in cases of wills the intention will prevail over the words. But then the mistake must be apparent on the face of the will, otherwise there can be no relief; for parol evidence or evidence dehors the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.<sup>2</sup>

(aa.) It is clear that in point of law, a mere misdescription of a legatee will not defeat the legacy. But it is equally clear that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which can alone be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy.<sup>3</sup> Thus, where a woman gave a legacy to a man, describing him as her husband, when, in point of fact, the marriage was void, he having a former wife then living, the bequest was in equity held void.<sup>4</sup> But when a testator made a will giving all his property to his wife, and appointing her sole executrix, and she (it was alleged) was not his lawful wife, having had a former husband living, the Court of Chancery in a very recent case declined jurisdiction, upon the ground that the matter was one for the Court of

(3.) Defective execution of powers.

(4.) Mistakes in wills.

(aa.) Mere misdescription of legatee will not defeat legacy, unless legacy obtained by a false personation.

<sup>1</sup> See pp. 361-363, *supra*.

<sup>2</sup> *Milner v. Milner*, 1 Ves. Sr. 106; *Stebbing v. Walkey*, 2 Bro. C. C. 85.

<sup>3</sup> *Giles v. Giles*, 1 Keen, 692.

<sup>4</sup> *Kennell v. Abbot*, 4 Ves. 808.

Probate,<sup>1</sup>—a decision which goes far towards cutting away altogether the jurisdiction of the Chancery Division in the matter of mistakes in wills.

(bb.) Revocation of legacy on a mistake of facts.

(bb.) Where a legacy is given or revoked upon a mistake of facts, equity will give relief. Thus, if a testator revokes legacies to A. and B., giving as a reason that they are dead, and they are in fact living, equity will hold the revocation invalid, and decree the legacies.<sup>2</sup> But a false reason given for a legacy, or for the revocation of a legacy, is not always a sufficient ground to avoid the act or bequest in equity. To have such an effect, it must be clear that no other motive mingled in the legacy, and that it constituted the substantial ground of the act or bequest.<sup>3</sup> In *Kennell v. Abbot*,<sup>4</sup> the Master of the Rolls thus expresses himself:—"I desire to be understood not to determine, that where, from circumstances not moving from himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection for that child, supposing it to be his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it, and might entitle him, though he might not fill that character in which the legacy is given. Neither would I have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy as to his chaste

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<sup>1</sup> *Meluish v. Milton*, L. R. 3 Ch. Div. 27, following *Allen v. M'Pherson*, 1 H. L. C. 191.

<sup>2</sup> *Campbell v. French*, 3 Ves. 321.

<sup>3</sup> *Box v. Barrett*, L. R. 3 Eq. 244.

<sup>4</sup> 4 Ves. 808.



wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field.''

Finally, it must be remembered, that in all cases of relief by aiding or correcting defects or mistakes, the party seeking relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a court of equity is silent and passive. Thus, equity will not give relief as against a *bona fide* purchaser for valuable consideration.<sup>1</sup>

Nor will equity relieve one person claiming under a voluntary defective conveyance against another claiming also under a voluntary conveyance, but will leave the parties to their rights at law.<sup>2</sup>

Nor will the remedial powers of courts of equity extend to the supplying of any circumstances, for the want of which the legislature has declared an instrument void; for otherwise, equity would in effect defeat the very policy of the legislative enactments.<sup>3</sup>

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<sup>1</sup> Powell v. Price, 2 P. Wms. 535; Davies v. Davies, 4 Beav. 54; Thompson v. Simpson, 1 Dr. & War. 491.

<sup>2</sup> Moodie v. Reid, 1 Mad. 516.

<sup>3</sup> Hibbert v. Rolleston, 3 Bro. C. C. 571; Dixon v. Ewart, 3 Mer. 322.

Cases in which equity will not relieve against a mistake of fact—  
(1.) The party claiming relief must have a superior equity.

(2.) No relief as between volunteers.

(3.) Or where defect is declared fatal by statute.

## ' CHAPTER III.

### ACTUAL FRAUD.

Fraud.

In what cases relief given in equity.

It may be laid down as a general rule that courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of, the common law courts. There are a variety of cases of fraud for which the common law affords complete and adequate relief, and with reference to these cases, Chancery may be said to possess a general and perhaps a universal *concurrent* jurisdiction. Moreover, there were many cases in which fraud was utterly irremediable at law, and over these courts of equity had an exclusive jurisdiction, and they still in substance retain it.

No invariable rule.

“As to relief against frauds, no invariable rules can be established. Fraud is infinite; and were a court of equity once to lay down rules how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes, which the fertility of man’s invention would contrive.”<sup>1</sup>

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<sup>1</sup> Park’s Hist. of Chan. 508.

To attempt, therefore, the definition of a subject so varied and diversified in its forms as fraud, would scarcely be judicious or useful, if it were possible. The mode and extent of the equity jurisdiction over fraud will best be illustrated by the examination of a few of the more marked classes of cases, in which the principles which regulate the action of courts of equity are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.

Before, however, proceeding to those subjects it may be proper to observe that although courts of law, equally with courts of equity, hold that fraud is not to be presumed, the latter courts used to act upon circumstances as presumptions of fraud, where courts of common law would not have deemed them satisfactory proofs. In other words, courts of equity would grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law.<sup>1</sup> Or, to express the matter rather more fairly, various circumstances (which at law would not have weighed materially with a jury) were permitted by the Chancellor, drawing inferences from his varied experience of like transactions, to influence his mind in arriving at his own conclusions upon the case; for the student should always bear in mind, that nothing is or can be evidence in equity which is not evidence also at law.

Equity acts upon weaker evidence than law in inferring fraud.

The subject of fraud may be divided into two sections,—Actual Fraud and Constructive Fraud.

An Actual Fraud may be defined as something said, done or omitted, with the design of perpetrat- Actual fraud.

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<sup>1</sup> *Chesterfield v. Janssen*, 1 Smith L. C. 551; *Fullager v. Clarke*, 18 Ves. 483.

ing what the party must have known to be a positive fraud.<sup>1</sup>

Of two kinds.

Actual frauds are of two kinds—<sup>2</sup>

I. Frauds arising irrespectively of any peculiarity in the position of the injured party ; and,

II. Frauds arising chiefly from a consideration of the peculiar position of the injured party.

1. Arising irrespectively of position of injured party.  
(a) *Misrepresentation*.

I. (a.) One of the largest classes of cases in which courts of equity are accustomed to grant relief is where there has been a misrepresentation, or *suggestio falsi*. With reference to this subject the following propositions may be laid down :—

Where the party makes it intentionally.

Where a party intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him or to obtain an undue advantage over him, in every such case there is a positive fraud, in the truest sense of the term.<sup>3</sup> And what is more, every man must be held responsible for the consequences of a false representation made by him to another, upon which a *third person* acts, and so acting is injured or damnified ; *provided it appear that such false representation was made with the intent that it should be acted upon by such third person* in the manner that occasions the injury or loss, and provided the injury be the immediate and not the remote consequence of the representation thus made.<sup>4</sup>

Misrepresentation made with intent to mislead a *third party*.

Where party did not know his assertion to be true.

And not only does fraud exist where the statements are known to be false by those who make them, but a case of fraud is also constituted where statements, false in fact, are made by persons who

<sup>1</sup> Sm. Man. 56.

<sup>2</sup> Sm. Man. 58.

<sup>3</sup> Hill v. Iane, L. R. 11 Eq. 215. [Byard v. Holmes, 5 Vroom. 297.]

<sup>4</sup> Barry v. Croskey, 2 Johns. & Hem. 22; Attorney-General v. Ray, L. R. 9 Ch. 397.

do not know them to be true or false, or who believe them to be true, if, in the due discharge of their duty, they ought to have known, or if they had formerly known and ought to have remembered the fact which negatives the representation made.<sup>1</sup>

As a matter of conscience, any deviation from the most exact and scrupulous sincerity is contrary to the good faith that ought to prevail in contracts. But courts of justice generally find themselves compelled to assign limits to the exercise of their jurisdiction, far short of the principles deducible *ex æquo et bona*; and with reference to the concerns of human life, they endeavor to aim at mere practical good and general convenience. Accordingly, therefore, a misrepresentation, in order to justify the rescission of a contract, must be *as to some material fact constituting an inducement or motive to the act or omission of the other party*. "To use the expression of the Roman law, it must be a *fraus dans locum contractui*, that is, a misrepresentation giving occasion to the contract; the proper interpretation of which appears to me to be the assertion of a fact, on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into the contract; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether.<sup>2</sup>

What misrepresentations entitled to relief.

(1.) Misrepresentation must be of some material fact, i. e., it must be a case of *fraus dans locum contractui*.

In the next place the misrepresentation must (at least, in cases of vendor and purchaser) be not only in something material, but it must be something in regard to which the one party places a known trust or confidence in the other.

(2.) Misrepresentation must be of something in which there is a confidence reposed.

<sup>1</sup> Pulsford v. Richards, 17 Beav. 94; Rawlins v. Wickham, 1 Giff. 355; 3 De G. & J. 304.

<sup>2</sup> Pulsford v. Richards, 17 Beav. 96. [Daniel v. Mitchell, 1 Story, 172.]

Mere puffing, with opportunity to examine, is no misrepresentation.

For if the purchaser, choosing to judge for himself, does not avail himself of the knowledge, or means of knowledge, open to him or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations, for the rule in such a case is *caveat emptor*. To this ground of unreasonable indiscretion and confidence, may be referred the common language of puffing and commendation of commodities, which, however reprehensible in morals, as gross exaggerations or departures from truth, are nevertheless not treated as frauds which will avoid contracts. *Simplex commendatio non obligat*. Further, the alleged misrepresentation must not be a mere matter of opinion, equally open to both parties for examination and inquiry, where neither party is presumed to trust the other, but to rely on his own judgment.<sup>1</sup>

(3.) The party must be misled by the representation to his prejudice.

In the next place, the party must be misled by the misrepresentation; for if he knows it to be false when made it cannot influence his conduct, and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make under such circumstances.<sup>2</sup> And further, the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage.<sup>3</sup>

Fraud, consisting in misrepresentations by directors of companies

In the case of misrepresentations made by the directors of joint stock and other companies, the company is responsible for the damage to the extent of the profits it has made thereby, and other-

<sup>1</sup> [French v. Griffin, 3 C. E. Green, 279.]

<sup>2</sup> Nelson v. Stocker, 4 De G. & J. 458. [Wells v. Waterhouse, 22 Me. 131.]

<sup>3</sup> Slim v. Croucher, 1 De G. F. & J. 518; Fellows v. Gwydyr, 1 Sim. 63. [Taylor v. Guest, 58 N. Y. 262.]

wise the remedy is against the directors personally.<sup>1</sup> Further, the defrauded person may in such a case recover, or (as the case may be) prove for, the amount paid by him to the company.<sup>2</sup> As regards the fraudulent directors, they are jointly and severally liable, and the action may therefore be brought against one or more of them alone without the other or others.<sup>3</sup> But *nota bene*, no action lies against the executor of a deceased fraudulent director, unless to the extent (if any) that his estate has profited thereby.<sup>4</sup>

Where a person has been induced to enter into a contract by a material misrepresentation of the other party, the latter shall be compelled to make it good at the option of the former, if the representation be one which can be made good; if not, the person deceived shall be at liberty to avoid the contract.<sup>5</sup>

A person cannot avail himself of what has been obtained by the fraud of another, unless he is not only free from any participation in the fraud, but also has given some valuable consideration.<sup>6</sup> Otherwise, he who takes the property, as was said in *Bridgeman v. Green*,<sup>7</sup> "must take it tainted and infected with the imposition of the person procuring the gift: his partitioning and cantoning it out amongst his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be

Remedy, where misrepresentation can be made good, and where it cannot.

Defences against action:  
(1.) The plaintiff was *particeps fraudis*.

<sup>1</sup> *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145.

<sup>2</sup> *Allison's case*, L. R. 15 Eq. 394.

<sup>3</sup> *Parker v. Lewis*, L. R. 8 Ch. App. 1035.

<sup>4</sup> *Peek v. Gurney*, L. R. 6 H. L. 377.

<sup>5</sup> *Pulsford v. Richards*, 17 Beav. 95; *Rawlins v. Wickham*, 3 De G. & J. 304, 322; *Attorney-General v. Ray*, L. R. 9 Ch. 397.

<sup>6</sup> *Scholefield v. Templer*, 4 De G. & J. 433; *Vane v. Vane*, L. R. 8 Ch. 383.

<sup>7</sup> *Wilm.* 64.

ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

(2.) The plaintiff's subsequent ratification.

The defrauded party may, by his subsequent acts, with full knowledge of the fraud, deprive himself of all right to relief, as well in equity, as at law; as if with full knowledge of the fraud he gives a release to the party who has defrauded him, or has continued to deal with him after he knew all the facts.<sup>1</sup>

(b.) *Suppressio veri*,—a ground of relief, only where the party was under a legal obligation to disclose.

(b.) Another class of cases for relief in equity, is where there is an undue concealment, or *suppressio veri*, to the injury or prejudice of another. A *suppressio veri* is as fatal as a *suggestio falsi*. It is not every concealment, however, even of facts that are material to the interests of a party, which will entitle him to the interposition of a court of equity, and in this respect concealment differs from misrepresentation. The case must amount to the suppression of facts which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, in respect of which he cannot be innocently silent, and which the other party has a right, not merely *in foro conscientiæ*, but *in foro juridico*, to know.<sup>2</sup>

Purchase of land with mine unknown to vendor, but known to vendee.

Thus, it was said by Lord Thurlow in *Fox v. Mackreth*,<sup>3</sup> that if A., knowing of a mine on the estate of B., of which he knows B. to be ignorant, should, concealing the fact, enter into a contract to purchase that estate for a price which it would be worth, without considering the mine, the contract would be good. In such cases, the question is not whether an advantage has been taken, which in point

<sup>1</sup> Story 203 (a); *Vigers v. Pike*, 8 Cl. & Fin. 562, 630.

<sup>2</sup> *Fox v. Mackreth*, 1 Smith L. C. 123; *Turner v. Harvey*, Jacob, 17; [*Laidlaw v. Organ*, 2 Wheat. 178.]

<sup>3</sup> 2 Bro. C. C. 420.



of morals is wrong or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but also to show some obligation binding the party to make the discovery.

On the other hand, if a vendor should sell an estate knowing he had no title to it, or knowing that there were incumbrances on it of which the vendee was ignorant, the suppression of such a material fact, in respect of which the vendor must know, that the very purchase implied a trust and confidence on the part of the vendee, that no such defect existed, would clearly avoid the sale on the ground of fraud.<sup>1</sup>

In many cases, especially in the case of sales of personal chattels, the maxim *caveat emptor* is applied; and unless there be some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, and unless the vendor is under some obligation to make a disclosure, the vendee is understood to be bound by the sale, notwithstanding there may be any intrinsic defects in it known to the vendor, but unknown to the vendee, materially affecting its value, and regarding which the vendor has merely held his tongue. *Nam qui tacet, non videtur affirmare.*<sup>2</sup>

But there are, on the other hand, certain cases where, from the very nature of the transaction, the silence of the party—his mere concealment of a fact—must import as much as a direct affirmation, and be deemed equivalent to it. Cases of insurance afford a ready illustration of this doctrine. In such

Sale of land subject to incumbrances known only to vendor.

As to intrinsic defect in personal chattels; *caveat emptor*. Unless there be some artifice or warranty. Or vendor was bound to disclose.

Silence tantamount to direct affirmation,—but in exceptional cases only, e. g.—Cases of insurance.

<sup>1</sup> Arnot v. Biscoe, 1 Ves. Sr. 95, 97; Edwards v. M'Leay, 2 Swanst. 287; Ellard v. Llandaff, 1 Ball. & B. 241.

<sup>2</sup> Martin v. Morgan, 1 Brod. & Bing. 289; Walker v. Symonds, 3 Swanst. 62.

cases the underwriter necessarily reposes a trust and confidence in the insured, as to all facts and circumstances which are peculiarly within his (the insured's) own knowledge, and which are not of a public and general nature, or which the underwriter either knows or is bound to know. Indeed, most of the facts and circumstances which may affect the risk are generally within the knowledge of the insured only; and therefore, the underwriter may be said emphatically to place trust and confidence in him as to all such matters. And hence, the general principle is, that in all cases of insurance the insured is bound to communicate to the underwriter all facts and circumstances, material to the risk, within his knowledge; and if they are withheld, whether the concealment be by design or by accident, it is equally fatal to the contract.<sup>1</sup>

Inadequacy of consideration *per se* will not avoid a contract.

Inadequacy of consideration, or any other inequality in the bargain, is not to be understood as constituting, *per se*, a ground to avoid a bargain in equity.<sup>2</sup> For courts of equity, as well as of law, act upon the ground that every person who is not, from his peculiar circumstances or condition, under disability, is entitled to dispose of his property in such manner, and upon such terms, as he chooses. Besides, the value of a thing is what it will produce, in its nature fluctuating, and depending on a thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances which may induce him to part with it at a particular time. On the other hand, the sole inducement to a purchaser may be the lowness of

<sup>1</sup> Pole v. Fitzgerald, 4 Bro. P. C. 439; De Costa v. Scandret, 2 P. Wms. 170; Proudfoot v. Montefiore, L. R. 2 Q. B. 511. See also London Assurance Co. v. Mansel, 11 Ch. Div. 363.

<sup>2</sup> Abbot v. Sworder, 5 De G. & Sm. 448; Harrison v. Guest, 6 De G. M. & G. 424.

the price; or the purchaser may have simply accepted the proposals of the vendor, instead of being the originator of the transaction, like a man whose design is to gain a fraudulent advantage over another.<sup>1</sup>

Still, however, there may be such unconscionableness or inadequacy in a bargain as to demonstrate *per se* some gross imposition or undue influence; and in such cases courts of equity will interfere upon the ground of inadequacy alone. But then such unconscionableness or such inadequacy should be made out as would shock the conscience, and would amount in itself to conclusive and decisive evidence of fraud. And where the inadequacy is not of that shocking character, but there are other ingredients in the case of a suspicious nature, the inadequacy furnishes the most vehement presumption of fraud;<sup>2</sup> as if proper time is not allowed to the party, and he acts improvidently; if he is importunately pressed; if those in whom he places confidence make use of strong persuasions; if he is not fully aware of the consequences, but is suddenly drawn into the act; if he is not permitted to consult disinterested friends or counsel before he is called upon to act in circumstances of sudden emergency or unexpected right or acquisition; in these, and many like cases, if there has been gross inequality in the bargain, courts of equity will set aside the contract at the instance of the party defrauded.

However, suspicious circumstances are many times explained away consistently with truth and fairness, and even an apparent inadequacy may not be a real inadequacy when everything is known. Thus, in *Harrison v. Guest*,<sup>3</sup> where, after the death

Inadequacy may be evidence of fraud, especially an inadequacy shocking the conscience, or an inadequacy coupled with other circumstances of suspicion.

*Harrison v. Guest*,  
—an apparent in-

<sup>1</sup> Sm. Man. 64.

<sup>2</sup> *Harrison v. Guest*, 6 De G. M. & G. 424.

<sup>3</sup> 6 De G. M. & G. 424.

adequacy explainable away.

of a vendor, the sale was impeached by his representatives, on the ground that at the time of the sale he was an illiterate, bed-ridden old man of seventy-one years of age, and had acted without independent professional advice, and had conveyed away the property in question, of the value of £400, for the consideration of a provision by way of board and lodging during his life, which only endured six weeks after the conveyance, it was held that, in the absence of any fraud, and the evidence showing that he had declined to employ professional advice for himself, such a transaction was not impeachable on the mere ground of the apparent inadequacy of consideration.<sup>1</sup>

Equity will not aid where parties cannot be placed *in statu quo*.

Moreover, courts of equity will not relieve in all cases, even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed *in statu quo*; as, for instance, in cases of marriage settlements, for the court cannot unmarry the parties.<sup>2</sup>

Fraudulent contracts usually valid, until avoided.

Contracts affected with fraud are in general voidable only, and not void; consequently, such a contract is valid until it is rescinded. The rescission may become impossible after the rights of third parties have intervened. Thus, a fraudulent contract cannot be rescinded after the commencement of the winding up of the company.<sup>3</sup> A *de facto* removal of the shareholder's name from the register, or even the commencement of an action for the removal, is, however, a sufficient repudiation of the fraudulent contract.

If the fraudulent contract should in any case be void, then no repudiation of it is required.

<sup>1</sup> Abbot v. Swooner, 4 De G. & S. 448; Longmate v. Ledger, 2 Giff. 157.

<sup>2</sup> North v. Ansell, 2 P. Wms. 619.

<sup>3</sup> Spackman v. Evans, L. R. 3 H. L. 171; Oakes v. Turquand, L. R. 2 H. L. 325.

Occasionally, however, contracts for shares, although fraudulent, are not avoidable at all; thus, if A. by fraud induces B to buy A.'s shares, and the company is not implicated in A.'s fraud,—then of course the contract will hold good as between B. and the company; and B.'s remedy (if any) is against A. only, and is for a retransfer of the shares and an indemnity;<sup>1</sup> and the rule is the same, even if A. be a director of the company.

II. Cases of fraud arising chiefly from the peculiar condition of the injured parties.

II. Cases of fraud arising from the condition of the injured parties. Free and full consent necessary to every agreement.

The general theory of the law, in regard to acts done and contracts made by parties, affecting their rights and interests, is that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. And, therefore, it has been well remarked that every true consent supposes three things: first, a physical power; secondly, a moral power; and thirdly, a serious and free use of them.

Gifts and legacies are often bestowed upon persons upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. In such cases, the doctrine is now firmly established that courts of equity will not suffer the manifest object of the condition to be defeated by the fraud, or dishonest, corrupt, or unreasonable refusal of the party whose consent is required to the marriage.<sup>2</sup>

Gifts and legacies on condition against marrying without consent.

1. Hence it is that the contracts and other acts of persons *non compotes mentis* (not so found by inquisition and *a fortiori* if so found), wherever,

1. Persons *non compotes mentis*,—their contracts are usually void.

<sup>1</sup> Kerr on Fraud, 273.

<sup>2</sup> Dashwood v. Bulkeley, 10 Ves. 245; Clarke v. Parker, 19 Ves. 18.

But a contract with a lunatic in good faith, and for his benefit, will be upheld.

from the nature of the transaction, there is not entire good faith, or the contract or other act is not seen to be just in itself, or for the benefit of those persons, will be set aside in a court of equity. But where a contract is entered into with good faith, and is for the benefit of such persons, such as for necessities, courts of equity, as well as of law, will uphold the transaction; also, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo*, or in the state in which they were before the purchase.<sup>1</sup>

2. Drunkenness, —amounting to a want of understanding, contracts how affected by.

2. But to set aside any act or contract on account of drunkenness it is not sufficient that the party is under undue excitement or lethargy from liquor. The excitement or lethargy must rise to that degree in which the party is utterly deprived for the time of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part. If there be not that degree of excitement or of lethargy, then courts of equity will not interfere at all, at least upon the mere ground of drunkenness; but, of course, there may have been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication, and in that case, the court might relieve. In general, courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained a deed or agreement from another in a state of intoxication; and on the other hand, they are equally unwilling to assist the intoxicated party (unless he was wholly incapaci-

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<sup>1</sup> Manby v. Bewicke, 3 K. & J. 342.

tated as aforesaid) to get rid of his agreement or deed merely on the ground of his intoxication at the time; but they leave the parties to their ordinary remedies at law, unless there is some contrivance or some imposition practised.<sup>1</sup>

3. Closely allied to the foregoing are cases, where a person, although not positively *non compos*, or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity, or undue influence. In such cases, if the circumstances justify the conclusion that the party has been imposed on or circumvented, the transaction will be held void in equity; and the burden of proof is on the other party, to show that no unfair advantage was taken of his weakness, and that a fair price was given to him.<sup>2</sup>

4. Cases of an analogous nature may be easily put, where the party is subjected for the time to undue influence, although in other respects and at other times he is of competent understanding; as where he does an act or makes a contract when he is under duress, or under the influence of extreme terror, or of threats, or of apprehensions short of duress. For in cases of this sort he has no free will, but stands *in vinculis*. And the constant rule in equity is, that where a party is not a free agent, and is not equal to protecting himself, the court will protect him.<sup>3</sup> Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may in like manner justify the court in setting aside a contract by him, on account of some oppression or

Parties left to their remedy at law.

3. Imbecile persons.

4. Persons of competent understanding under undue influence.

(a.) Duress.

(b.) Extreme necessity.

<sup>1</sup> Clarkson v. Kitson, 4 Gr. 244.

<sup>2</sup> Longmate v. Ledger, 2 Giff. 164.

<sup>3</sup> Evans v. Llewellyn, 1 Cox. 340; Hawes v. Wyatt, 3 Bro. C. C. 158; M'Cann v. Dempsey, 6 Gr. 192.

fraudulent advantage or imposition attendant upon it.<sup>1</sup>

(5.) Infants.

5. The acts and contracts of infants (not being for necessities) are not as a general rule binding upon them, because the presumption of the law is that they have not sufficient reason or discernment of understanding to bind themselves. There are indeed certain cases in which infants are permitted by law to bind themselves by their acts and contracts; for, not to mention contracts for necessities suitable to their degree and quality, which are, of course, binding upon them, they are also bound by a contract of hiring and services for wages, or by some act which the law requires them to do. But generally infants are favored by the law, as well as by equity, in all things which are for their benefit, and are saved from being prejudiced by anything to their disadvantage. But this rule is designed as a shield for their own protection, and not as a means to perpetrate a fraud or injustice on others; at least, not where courts of equity have authority to reach it in cases of meditated fraud.<sup>2</sup>

There is an important difference between the acts and contracts of infants on the one hand, and those of lunatics, idiots, &c., on the other. The act or contract of a lunatic or idiot is, *ab initio*, void, and can never be validated in any mode. But in regard to the acts and contracts of infants, some are wholly void, others are merely voidable. Where they are utterly void, they are from the beginning mere nullities, and incapable of operation. But where they are voidable, it is in the election of the infant to

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<sup>1</sup> Story 239; Gould v. Okeden, 4 Bro. P. C. 198; Farmer v. Farmer, 1 H. L. Cas. 724; Boyse v. Rossbrough, 6 H. L. Cas. 2, 49.

<sup>2</sup> Lempriere v. Lange, W. N. 1879, 158.



avoid them or not, when he arrives at full age. In general, where a contract may be for the benefit, or to the prejudice, of an infant, he may avoid it as well at law as in equity. Where it can never be for his benefit, it is utterly void.

6. In regard to *femes covert* the case is still stronger ; for, generally speaking, at law they have no capacity to do any acts, or to enter into any contracts, and such acts and contracts are treated as mere nullities. Courts of equity, however, have broken in upon this doctrine, and have in many respects treated the wife as capable of disposing of her own separate property, and of doing other acts, as if she were a *feme sole*. In cases of this sort, the same principles will apply to the acts and contracts of a married woman, as would apply to her as a *feme sole*, unless the circumstances give rise to a presumption of fraud, imposition, unconscionable advantage, or undue influence.

6. *Femes covert* have not a general capacity to contract at law, but may do so as to their separate estate in equity, and as to their statutory separate estate both at law and in equity.

## CHAPTER IV.

## CONSTRUCTIVE FRAUD.

Constructive  
fraud.

By Constructive Frauds are meant such acts or contracts as, although not originating in any actual design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as being acts and contracts done *malo animo*.

Three classes.

The cases under this head may be divided into three classes.

I. Cases of constructive fraud, so called because they are contrary to some *general public policy* or to *the policy of the law*.

II. Constructive frauds, which arise from the abuse of some peculiar, confidential, or fiduciary relation between the parties.

III. Constructive frauds, which unconscientiously compromise, or injuriously affect, or operate substantially as frauds upon the private rights, interests, duties, or intentions of the parties themselves, or of third persons.

I. Cases of constructive fraud, so called because they are contrary to some general public policy, or to some fixed artificial policy of the law. I. Constructive frauds as contrary to policy of the law.

Marriage brokerage contracts, by which a person engages to give another some reward or remuneration if he will negotiate a marriage for him, are utterly void<sup>1</sup> and incapable of confirmation;<sup>2</sup> and money paid pursuant to such contracts may be recovered back in equity.<sup>3</sup> (1.) Marriage brokerage contracts.

On the same principle, every contract by which a parent or guardian obtains any remuneration for promoting or consenting to the marriage of his child or ward is void.<sup>4</sup> (2.) Reward to parent or guardian to consent to marriage of child.

The same principle pervades that class of cases where persons, upon a treaty of marriage, by any concealment or misrepresentation, mislead other parties, or do acts which are by other secret agreements reduced to mere forms, or become inoperative. Thus, where a man, on the treaty for the marriage of his sister, let her have money privately, in order that her portion might appear as large as was insisted on by the intended husband, and she gave a bond to her brother for the payment of it, it was decreed to be delivered up.<sup>5</sup> (3.) Secret agreements in fraud of marriage.

The same rules are applied to cases where bonds are given, or other agreements made, as a reward for using influence and power over another person to induce him to make a will in favor of the obligor, and for his benefit; for all such contracts tend to (4.) Rewards given for influencing another person in making a will.

<sup>1</sup> Hall v. Potter, Show, P. C. 76.

<sup>2</sup> Cole v. Gibson, 1 Ves. Sr. 503; Roberts v. Roberts, 3 P. Wms. 74.

<sup>3</sup> Smith v. Bruning, 2 Vern. 392.

<sup>4</sup> Keat v. Allen, 2 Vern. 588.

<sup>5</sup> Gale v. Lindo, 1 Vern. 475; Palmer v. Neave, 11 Ves. 165; Redman v. Redman, 1 Vern. 348; Neville v. Wilkinson, 1 Bro C. C. 543.

deceive and injure others, and encourage artifices and improper attempts to control the exercise of their free judgment.<sup>1</sup>

(5.) Contracts in general restraint of marriage void.

Contracts in general restraint of marriage are void, as against public policy, and the due economy and morality of domestic life; and so, if a condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration. Thus, where a legacy was given to a daughter, on condition that she should not marry a man who was not seised of an estate in fee simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage.<sup>2</sup>

(6.) Contracts in general restraint of trade void, but not special restraints.

Contracts in general restraint of trade are also void, as tending to promote monopolies, and to discourage industry, enterprise, and just competition. But the same reasoning does not apply to a limited restraint of trade, *e. g.*, not to carry on trade at a particular place, or with particular persons, or for a limited reasonable time; and a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret.<sup>3</sup>

(7.) Agreements founded on violation of public confidence.

In like manner, agreements which are founded upon violations of public trust or confidence, or of the rules adopted by courts in furtherance of the administration of public justice, are held void. Thus, contracts for the buying, selling, or procur-

<sup>1</sup> Debenham v. Ox, 1 Ves. 276.

<sup>2</sup> Kelly v. Monck, 3 Ridg. P. C. 205; Scott v. Tyler, 2 Sneed, Smith L. C. 115; [Maddox v. Maddox, 11 Gratt. 804.]

<sup>3</sup> Story, 292; Bryson v. Whitehead, 1 Sim. & Stu. 74; Benwell v. Inns, 24 Beav. 307; Harms v. Parson, 32 Beav. 328.

ing of public offices,<sup>1</sup> agreements founded on the suppression of criminal prosecutions,<sup>2</sup> contracts which have a tendency to encourage champerty,<sup>3</sup> and generally all agreements founded upon corrupt considerations or moral turpitude, whether they stand prohibited by statute or not, are treated as frauds upon public policy or public law.

As buying and selling offices.

In general, where parties are concerned in illegal agreements, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participators in a common fraud, will not interpose to grant any relief, acting upon the well-known maxim, *in pari delicto potior est conditio possidentis*.<sup>4</sup> But in cases where the agreement is repudiated on account of its being against public policy, the circumstance that the relief is asked by a party who is *particeps fraudis*, is not in equity material. The reason is, that the public interest requires that relief should be given and it is given to the public through the party,<sup>5</sup> and not to the party, excepting as an indirect consequence occasionally.

Neither party to an illegal agreement is aided, as a general rule.

Except where agreement is contrary to public policy.

II. Constructive frauds which arise from the abuse of some peculiar, confidential, or fiduciary relation between the parties.

II. Constructive frauds arising from the fiduciary relation.

In this class of cases there is often to be found some intermixture of deceit, imposition, over-reaching, unconscionable advantage, or other mark of direct fraud. But the principle on which courts of

<sup>1</sup> *Chesterfield v. Janssen*, 1 Atk. 352; *Hartwell v. Hartwell*, 4 Ves. 811.

<sup>2</sup> *Johnson v. Ogilby*, 3 P. Wms. 277.

<sup>3</sup> *Powell v. Knowler*, 2 Atk. 224; *Reynell v. Sprye*, 1 De G. M. & G. 660.

<sup>4</sup> *Howson v. Hancock*, 8 T. R. 675; *Osborne v. Williams*, 18 Ves. 379.

<sup>5</sup> *St. John v. St. John*, 11 Ves. 535; *Roberts v. Roberts*, 3 P. Wms. 66; *Smith v. Bromley*, Dougl. 696; *Rider v. Kidder*; 10 Ves. 360.

equity act in regard thereto, stands independent of any such ingredients, upon a motive of general public policy. The general principle which governs in all cases of this sort is, that if confidence is reposed, and that confidence is abused, courts of equity will grant relief.

(1.) Gifts from child to parent void if not in perfect good faith.

In the first place, as to the relation of parent and child, all contracts and conveyances whereby benefits are secured by children to their parents, or to persons who stand *in loco parentis*, are the objects of the court's jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third parties have acquired an interest under them.<sup>1</sup> And where a child, shortly after attaining his or her majority, makes over property to his or her father without consideration, or for an inadequate consideration, equity will require the father to show that the child was really a free agent, and had adequate and independent advice.<sup>2</sup> And conversely in a recent Canadian case, a deed of gift, executed by a father infirm in mind and body in favor of one of his sons, was ordered to be given up and cancelled.<sup>3</sup>

Gift by child shortly after minority.

By father when infirm in mind and body.

(2.) Guardian and ward cannot deal with each other during the continuance of the relation.

Gift by ward soon after the termination of guardianship, viewed with suspicion.

In the next place, as to the relation of guardian and ward. During the existence of guardianship, the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have oc-

<sup>1</sup> Wright v. Vanderplank, 2 K. & J. 1; 8 De G. M. & G. 133; Baker v. Bradly, 7 De G. M. & G. 597; Kempsen v. Ashbee, L. R. 10 Ch. App. 15.

<sup>2</sup> Savery v. King, 5 H. L. Cas 627, Davies v. Davies, 4 Giff. 417; Hannah v. Hodgson, 30 Beav. 19.

<sup>3</sup> Mason v. Seney, 11 Grant, U. C. Chanc. 447.

curred after the minority has ceased, and the relation becomes thereby actually ended, if the intermediate period be short,<sup>1</sup> unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian.<sup>2</sup>

Where, however, the influence as well as the legal authority of the guardian over the ward has completely ceased, and the ward has been put in possession of his property after a full and fair settlement of accounts, equity will not interfere to set aside a reasonable gift to the guardian.<sup>3</sup>

(Gift upheld when influence and legal authority have ceased.)

The same principles are applied to persons standing in the situation of *quasi* guardians, or confidential advisers, as medical advisers,<sup>4</sup> or ministers of religion,<sup>5</sup> and to every case where influence is acquired and abused, where confidence is reposed and betrayed.<sup>6</sup>

(3.) *Quasi* guardians. Medical advisers. Ministers of religion.

In the next place, as to the relation between solicitor and client. In *Tomson v. Judge*,<sup>7</sup> A., who was proved to have entertained feelings of peculiar personal regard for B., his solicitor, conveyed to him certain real estate by a deed purporting to be a purchase-deed; the consideration was expressed to be £100, the value of the real estate being upwards of £1200. B., produced evidence to show that no money passed; that the transaction was never intended to be a purchase, but a gift for his services,

(4.) Solicitor and client.

<sup>1</sup> *Pierce v. Waring*, 1 P. Wms. 121.

<sup>2</sup> *Hatch v. Hatch*, 9 Ves. 267; *Wright v. Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133.

<sup>3</sup> *Hylton v. Hylton*, 2 Ves. Sr. 549; *Hatch v. Hatch*, 9 Ves. 297.

<sup>4</sup> *Dent v. Bennett*, 4 My. & Cr. 269.

<sup>5</sup> *Nottidge v. Prince*, 2 Giff. 246.

<sup>6</sup> *Smith v. Kay*, 7 H. L. Cas. 751. *Lyon v. Home*, L. R. 6 Eq. 655.

<sup>7</sup> 3 Drew, 306. See also *Morgan v. Minett*, L. R. 6 Ch. Div. 638; *Clark v. Girdwood*, 7 Ch. Div. 9.

A gift from client to solicitor pending that relation cannot stand.

A purchase from client, if there is perfect bona fides, is good.

and from affection. It was held that the rule is absolute, *that a solicitor cannot sustain a GIFT from his client*, made pending the relation of solicitor and client, and the deed was set aside. Kindersley, V.-C., said:—"Now, *as to the cases of PURCHASES by solicitors from their clients*, there is no rule of this court to the effect that a solicitor cannot make such a purchase. A solicitor can purchase his client's property even while the relation subsists; but the rule of the court is that such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to show that the transaction was perfectly fair, that the client knew what he was doing, and in particular that a fair price was given, and of course that no kind of advantage was taken by the solicitor. If the solicitor shows that the transaction was fair and clear, there is no difference between a purchase by him and a stranger. Is the rule with regard to gifts precisely the same, or is it more stringent? Less stringent it cannot be. There is this obvious distinction between a gift and a purchase. In the case of a purchase, the parties are at arm's length, and each party requires from the other the full value of that which he gives in return. In the case of a gift the matter is totally different, and it appears to me that there is a far stricter rule established in this court with regard to GIFTS than with regard to purchases; and that the rule of this court makes such transactions, that is, of a gift from a client to the solicitor, absolutely void."<sup>1</sup>

Solicitor must make no more advantage than his fair professional remuneration.

It is an established rule, therefore, that a solicitor shall not in any way whatever, in respect of any transactions in the relations between him and his

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<sup>1</sup> Holman v. Lynes, 18 Jur. 843; Welles v. Middleton, 1 Cox, 112; Hatch v. Hatch, 9 Ves. 292; Spencer v. Topham, 22 Beav. 573; Gresley v. Mousely, 4 De G. & J. 78; Lewis v. Hillman, 3 H. L. Cas. 630.



client, make any gain to himself at the expense of his client, beyond the amount of his just and fair professional remuneration.<sup>1</sup>

An agreement between a solicitor and client, that a gross sum shall be paid for costs for business already done, is valid. But in this case it behooves the solicitor to use great caution, and to preserve sufficient evidence that it was a fair transaction, and that his client was not under the influence of the pressure arising from the relation of solicitor and client,<sup>2</sup>—a pressure characterised by Lord Thurlow<sup>3</sup> as “the crushing influences of the power of an attorney who has the affairs of a man in his hand.”

In the next place, with regard to the relation of trustee and *cestui que trust*, it may be laid down as a general rule, that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it. It is a consequence of this rule, that a purchase by a trustee from his *cestui que trust*, even although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust*; and, as observed by Lord Eldon,<sup>4</sup> “it is founded upon this, that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys an estate, and by the knowledge acquired in that character discovers a valuable coal-mine under it, and

Agreement to pay a gross sum for past business is valid.

(5.) Trustee and *cestui que trust*. Trustee must not place himself in a position inconsistent with the interests of the trusts. 28 L. 282 Purchase by trustee from *cestui que trust* cannot be upheld.

<sup>1</sup> Tyrrell v. Bank of London, 10 H. L. Cas. 26; O'Brien v. Lewis, 4 Giff. 221; M'Cann v. Dempsey, 1 Gr. 192.

<sup>2</sup> Morgan v. Higgins, 1 Giff. 277.

<sup>3</sup> Welles v. Middleton, 1 Cox, 125.

<sup>4</sup> *Ex parte Lacey*, 6 Ves. 627.

locking that up in his own breast, enters into a contract with the *cestui que trust*; if he chooses to deny it, how can the court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded.”<sup>1</sup>

Exception on a clear and distinct and fair contract, that the *cestui que trust* intended the trustee to purchase.

It has been decided, however, that “a trustee may buy from the *cestui que trust*, provided there is a clear and distinct contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee.”<sup>2</sup> And, in fact, the rule as expressed by Lord Eldon in the words quoted above, would at the present day hold good (if at all) in the case only of a trustee for sale purchasing from his *cestui que trust* without the leave of the court to bid.

Trustee may purchase from *cestui que trust* who is *sui juris*, and has discharged him.

But although it is a general rule that a trustee cannot except in exceptional cases purchase from himself, as it has been said, there is no objection to his purchasing from his *cestui que trust*, who is *sui juris*, and who has discharged him from the obligation which attached upon him as a trustee; but even such a transaction will be watched by the court “with infinite jealousy.”<sup>3</sup>

Gift to trustee treated on same principles as one between guardian and ward.

A trustee is never permitted to partake of the bounty of his *cestui que trust*, except under circumstances which would make the same valid, if it were

<sup>1</sup> Hamilton v. Wright, 9 C. & F. 111, 123-5; Ingle v. Richards, 28 Beav. 361; Randall v. Errington, 10 Ves. 423; Campbell v. Walker, 5 Ves. 682; 13 Ves. 601.

<sup>2</sup> Coles v. Trecothick, 9 Ves. 234; Denton v. Donner, 23 Beav. 285.

<sup>3</sup> Ex parte Lacey, 6 Ves. 626; Fox v. Mackreth, 1 Smith L. C. 123.

a case of guardianship. The relation must have in fact ceased, and it must be proved that the influence arising from that relation has also ceased.

In the next place, as to the relation of principal and agent, the same principles are generally applicable. Agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principals,<sup>1</sup> or indeed to deal validly with their principals in any case, *except where there is the most entire good faith, and full disclosure of all facts and circumstances*, and an absence of all undue influence, advantage, or imposition.<sup>2</sup> And if an agent employed to make a purchase, purchase for himself, he will be held a trustee for his principal.<sup>3</sup> Nor will an agent employed to purchase be permitted, unless by the plain and express consent of his principal, to make any profit out of the transaction.<sup>4</sup>

(6.) Principal and agent.

Entire good faith and complete disclosure necessary in dealings between principal and agent.

Agent cannot make any secret profit out of his agency.

And the principles which apply to trustees, agents, and others, apply with almost equal force to other persons standing in confidential or fiduciary situations, as to counsel, agents, assignees and solicitors of a bankrupt's estate, auctioneers, and creditors who have been consulted as to the sale.<sup>5</sup>

(7.) Miscellaneous fiduciary persons. Counsel, auctioneers, &c.

Entire good faith is required between debtor and creditor and sureties. And if a creditor does any

Debtor, creditor, and sureties.

<sup>1</sup> Lowther v. Lowther, 13 Ves. 103; Charter v. Trevelyan, 11 C. & F. 714; Walsham v. Stainton, 1 De G. J. & S. 678.

<sup>2</sup> Story, 315; Dally v. Wonham, 33 Beav. 154; De Bussche v. Alt, 8 Ch. Div. 286.

<sup>3</sup> Lees v. Nuttall, 1 Russ. & My. 53; Taylor v. Salmon, 4 My. & Cr. 134.

<sup>4</sup> East India Co. v. Henchman, 1 Ves. Jr. 289; Bentley v. Craven, 18 Beav. 75; Tyrrell v. Bank of London, 10 H. L. Cas. 26; Beck v. Kantorowicz, 3 K. & J. 230; The Imperial Mercantile Credit Association v. Coleman, L. R. 6 H. L. 189.

<sup>5</sup> Pooley v. Quilter, 2 De G. & J. 327; Carter v. Palmer, 8 Cl. & Fin. 658; *Ex parte* Holyman, 8 Jur. 156; Kerr v. Bain, 11 Gr. 423; M'Pherson v. Watt, L. R. 3 App. 254.

act affecting the surety ; or if he omits to do any act which he is required to do by the surety, and is bound to do, and that act or omission proves injurious to the surety ; or if the creditor enters into any stipulations with the debtor unknown to the surety, and inconsistent with the terms of the original contract, the surety may set up such act, omission, or contract, as a defence to any suit brought against him in law or equity.<sup>1</sup>

III. Constructive frauds, as being unconscientious or injurious to the rights of third parties.

III. Constructive frauds which unconscientiously compromise or injuriously affect or operate substantially as frauds upon the private rights, interests, or duties of the parties themselves, or of third persons.

(1.) If contract not put into writing through fraud of a party, he cannot set up Statute of Frauds as a defence.

To this class may be referred many of those cases arising under the Statute of Frauds, which requires certain contracts to be in writing to give them validity. In the construction of that statute, a general principle has been adopted, that as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, in a variety of cases, where, from fraud, a contract of this sort has not been reduced into writing, but has been suffered to rest in confidence or in parol communications between the parties, courts of equity will enforce it against the party guilty of a breach of confidence, who attempts to shelter himself behind the provisions of the statute.<sup>2</sup>

(2.) Common sailors,—contracts by.

Common sailors being so extremely generous, improvident, and credulous, and therefore liable to be imposed upon, equity views their contracts respecting wages and prize-money with great jealousy ; and

<sup>1</sup> Sm. Man. 84.

<sup>2</sup> *Montacute v. Maxwell*, 1 P. Wms. 619; *Att.-Gen. v. Sitwell* 1, You. & Coll. Exch. Ca. 583; *Hussey v. Horne Payne*, 4 App. Ca. 311.

generally grants them relief, whenever any inequality appears in the bargain, or an undue advantage has been taken.<sup>1</sup>

Bargains with heirs, reversioners, and expectants, during the life of their parents or ancestors, will be relieved against, unless the purchaser can show that a fair price was paid; for fraud in this class of cases is usually though not always presumed from inadequacy of price.<sup>2</sup> And this rule is founded on good sense. The very fact of the expectant coming into the market to sell his expectancy, shows that he is not in a position to make his own terms, and that he is more or less in the power of the purchaser; in all such cases, therefore, actual distress need not be proved; a court of equity presumes that there is distress, and that is equivalent to saying, that the party has not that full power of deliberate consent which is essential to a valid contract. The onus, therefore, lies upon the person dealing with the reversioner or expectant, to show that the transaction is reasonable and *bona fide*.

It would seem that the fact that the father or other person standing *in loco parentis* was aware of or took part in the transaction does not necessarily make that valid which would otherwise be void. It will at the most raise a presumption in favor of the *bona fides* of the parties. If, therefore, a father, being unable to supply his son's necessities, assists and protects him in raising money from strangers, the son, in such a case, having in his father's advice presumptively the best security for obtaining the fair market value of what he sells, the court may

(3.) Bargains with heirs and expectants.

Knowledge of person standing *in loco parentis* does not *per se* make such transactions valid.

<sup>1</sup> Dow v. Wheldon, 2 Ves. Sr. 516.

<sup>2</sup> Peacock v. Evans, 16 Ves. 512; Hincksman v. Smith, 3 Russ. 433; Aylesford v. Morris, L. R. 8 Ch. 484; *In re Slater's Trusts*, 11 Ch. Div. 227.

perhaps infer that a bargain made under such circumstances was fair and for full value.<sup>1</sup>

(4.) *Post obits.*

It is upon similar principles that *post obit* bonds, and other securities of a like nature, are set aside when made by heirs and expectants. A *post obit* bond is an agreement, on the receipt of ready money by the obligor, to pay a sum exceeding the sum so received, and the ordinary interest thereof, on the death of the person from whom he, the obligor, expects to become entitled to some property. If in other respects these contracts are perfectly fair, courts of equity will permit them to have effect as securities for the sum to which *ex æquo et bono* the lender is entitled; for he who seeks equity must do equity.

(5.) Tradesmen selling goods at extravagant prices.

Where tradesmen and others have sold goods to young and expectant heirs at extravagant prices, and under circumstances demonstrating imposition, or undue advantage, or an intention to connive at secret extravagance, courts of equity have reduced the securities, and cut down the claims to their reasonable and just amount.

The party injured may acquiesce after the pressure of necessity has ceased.

In all these cases where, after the pressure of necessity has been removed, the party freely and deliberately, and upon full information, confirms the precedent contract, or other transaction, courts of equity will generally hold him bound thereby; for if a man is fully informed, and acts with his eyes open, he may, by a new agreement, bar himself from relief.

(6.) Knowingly producing a false impression to mislead a third party.

Another class of constructive frauds consists of those cases where a man designedly or knowingly produces a false impression on another, who is thereby drawn into some act or contract injurious to

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<sup>1</sup> King v. Hamlet, 2 My. & K. 456; Talbot v. Staniforth, 1 J. & H. 502; King v. Savery, 1 Sm. & G. 271; 5 H. L. Cas. 627.

his own rights or interests. There can be no real difference in effect between an express representation and one that is naturally or necessarily implied from the circumstances. The wholesome maxim of the law is, that the party who enables another to commit a fraud is answerable for the consequences;<sup>1</sup> and the maxim, *Fraus est celare fraudem* is, with proper limitations in its application, a maxim of general justice.<sup>2</sup> Thus, if a man having a title to an estate which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, the former so standing by, will be bound by the sale.<sup>3</sup> On the occasion of a loan upon the security of a lease, which the borrower represented himself as entitled to have granted to him for ninety-nine years, the lender required a written intimation from the alleged lessor of his intention to grant the lease. The lessor being apprised of the requisition and its object, signed the required intimation. The loan was made upon the faith of it, and afterwards the lessor granted a lease which was then mortgaged by the borrower to the lender. It turned out that the lessor had, some time before, demised the same premises for the same term to the borrower, by whom it had since been assigned for value. It was held that the court had jurisdiction to direct repayment by the lessor to the lender of the sum which he had advised, with interest, although the lessor was not shown to have been guilty of any conscious active fraud, or of having done more than *forgotten the previous lease* when he made the misrepresentation and granted

One who enables another to commit a fraud is answerable.

A man who has a title to property standing by and letting another purchase or deal with it, is bound.

Even though there be no fraud but only forgetfulness.

<sup>1</sup> Rice v. Rice, 2 Drew. 73.

<sup>2</sup> Rodgers v. Rodgers, 13 Gr. 143.

<sup>3</sup> Teasdale v. Teasdale, Sel. Ch. Cas. 59; Cawdor v. Lewis, 1 You. & Coll. Ex. Ca. 427.

the second lease.<sup>1</sup> In this case the borrower was, of course, guilty of an actual fraud; but the alternative and more direct remedy against him was probably worthless.

(7.) Agreements at auctions not to bid against one another.

Agreements whereby parties engage not to bid against each other at a public auction, especially where the same is directed or required by law, are held void, for they are unconscientious, and have a tendency to cause the property to be sold at an undervalue. On the other hand, if underbidders or puffers are employed at an auction to enhance the price, and to deceive other bidders, and they are in fact misled, the sale will be held void as against public policy.<sup>2</sup>

Puffer at sale by auction.

(8.) Fraud upon consenting creditors to a composition deed.

If a creditor who is party to a composition deed has obtained a secret and undue advantage as a condition of signing the deed, and has thus decoyed other innocent and unsuspecting creditors into signing the deed of composition, which they supposed to be founded upon the basis of entire equality and reciprocity among all the creditors, it is a fraud upon the policy of the law. And such secret arrangements are utterly void, even as against the assenting debtor or his sureties, and money paid under them is recoverable back.<sup>3</sup>

(9.) A person obtaining a donation must always be prepared to prove *bona fides*.

In every transaction where a person obtains by donation a benefit from another to the prejudice of that other person, and to his own advantage, if the transaction should afterwards be questioned, he should be able to prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect.<sup>4</sup> But the cases have not gone so

<sup>1</sup> Slim. v. Croucher, 1 De. G. F. & J. 518.

<sup>2</sup> Sugd. V. & P. 9.

<sup>3</sup> Mare Sandford, 1 Giff. 288.

<sup>4</sup> Cooke v. Lamotte, 15 Beav. 240; Anderson v. Elsworth, 3 Giff. 154.



far as to show that the donee, under a voluntary settlement, where no power of revocation is reserved, has thrown upon him in the first instance the onus of showing that the settlement was intended by the donor to be irrevocable.<sup>1</sup>

“No point is better established, than that a person having a power of appointment must exercise it *bona fide* for the end designed, otherwise it is corrupt and void.”<sup>2</sup> Hence when a parent, having a power of appointment among his children, appoints to one or more of them, to the exclusion of the others, *upon a bargain for his own advantage*, equity will relieve against the appointment on the ground of fraud, as where there is a secret understanding that the child should assign a part of the fund to a stranger,<sup>3</sup> or the father’s debtors.<sup>4</sup> So again if a parent, having a power to raise portions for children, and even to fix the time when they are to be raised, appoints to a child during infancy, and while not in want of a portion, especially if the death of the child at the time of the appointment is expected, he will not be allowed, on the child’s death, to derive any benefit from the appointment as the personal representative of that child.<sup>5</sup>

(10.) A power must be exercised *bona fide* for the end designed. Secret agreement in fraud of object of power.

Appointment by a father to a sickly infant.

Formerly, where a person having a power of appointing property among the members of a class, although with full discretion as to the amount of their respective shares, exercised that power by appointing to one or more of the objects a merely

Doctrine of illusory appointments.

<sup>1</sup> *Coutts v. Acworth*, L. R. 8 Eq. 558; *Wollaston v. Tribe*, L. R. 9 Eq. 44, explained in *Hall v. Hall*, L. R. 8 Ch. App. 430.

<sup>2</sup> *Aleyn v. Belchier*, 1 Smith L. C. 415.

<sup>3</sup> *Daubeny v. Cockburn*, 1 Mer. 626.

<sup>4</sup> *Farmer v. Martin*, 2 Sim. 502; *Carver v. Richard*, 1 De. G. F. & J. 548; *Salmon v. Gibbs*, 3 De G. & Sm. 343.

<sup>5</sup> *Hinchinbroke v. Seymour*, 1 Bro. C. C. 394; *Wellesly v. Mornington*, 2 K. & J. 143; *Roach v. Trood*, L. R. 3 Ch. Div. 429.

nominal share, such an appointment, although valid at law, was set aside as an illusory appointment, not being exercised *bona fide* for the end designed by the donor.<sup>1</sup> In consequence of the great difficulty and conflict of authority, as to what might be deemed a nominal or illusory share, the legislature interfered in the year 1830, and established in effect that no appointment shall be invalid on the ground that an unsubstantial, nominal, or illusory share of the property has been appointed to the objects of the power.<sup>2</sup>

(11.) A man representing a certain state of facts as inducement to a contract, cannot derogate from it by his own act.

“A man who has induced another to enter into a contract with him by representing an actual state of things as a security for the enjoyment of an interest which he has himself created for valuable consideration, is not at liberty by his own act to derogate from that interest by determining the state of things which he so held forth as the consideration or inducement for entering into the contract.”<sup>3</sup>

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<sup>1</sup> Wilson v. Piggott, 2 Ves. Jr. 351.

<sup>2</sup> 1 Will. c. 46; 1 Sugd. on Pow. 545.

<sup>3</sup> Piggott v. Stratton, Johnson, 341; 1 De G. F. & J. 33.

## CHAPTER V.

## SURETYSHIP.

Cases in which the peculiar remedies afforded by Suretyship. courts of equity constitute the principal ground of jurisdiction, constitute the second great branch of the concurrent jurisdiction as above subdivided, and thereunder fall to be considered the various matters following in this part of the work, and firstly, the matter of suretyship.

The contract of suretyship requires the utmost Utmost good faith required between all parties. good faith between all the parties to it; for they do not deal with one another at arm's length as in ordinary contracts. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise, or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract.<sup>1</sup>

It is a question even now not quite settled (or at least not generally or readily understood) as to what concealment of facts—what degree of *suppressio veri*—by the creditor is necessary to annul the obligation of the contract of suretyship. What concealment of facts by creditor releases surety? The general principle. Story

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<sup>1</sup> Davies v. London and Provincial Marine Insurance, 8 Ch. Div. 469.

lays down broadly that “if a party taking a guarantee from a surety conceals from him facts *which go to increase his risk*, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to fraud;” and this broad assertion of the rule is no doubt supported by the decided cases, although they or some of them seem very much to narrow the foundation of the doctrine, and to point to the conclusion, that the mere concealment of facts affecting the surety is not in itself a ground for rescinding the contract, unless either the party concealing them was under some obligation to disclose them, or the concealed facts themselves go directly and proximately to vary the liability of the surety. Thus, in the case of *Hamilton v. Watson*,<sup>1</sup> it appeared that A. became indebted to the B. Company in the sum of £750; that the B. Company amalgamated with the G. Company, and the latter Company took on itself the rights and liabilities of the former. On the G. Company calling on A. for payment of the debt due from him, A. entered into a bond, with H. as a surety, by which a new cash account should be opened with the G. Company to the amount of £750, H. not being informed of the previous debt. A week after the date of the bond, A. drew out a draft upon the new account with the G. Company for the whole £750 for which H. had become bound, and paid off with it the old debt due to the B. Company. It was held that this was not a sufficient concealment of facts to discharge the surety—that the mere circumstance of the parties supposing that the money was intended to be applied to a particular purpose did not appear to vitiate the transaction at all—that the creditor was under no obligation to

(1.) Either the fact must have been one which the creditor was under an obligation to discover. *Hamilton v. Watson*.

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<sup>1</sup> 12 Cl. & Fin. 109.

volunteer a disclosure of any transaction that passed between him and the other party—that if the surety would guard against particular perils, he must put the question and gain the information required—and that the true criterion as to whether any disclosure ought to be made voluntarily, was to inquire whether there was anything that might not naturally be expected to take place between the parties—that is, whether there was a contract between the debtor and creditor to the effect that his position should be different from that which the surety might naturally expect.

It is to be observed of the last-mentioned case that the amount of the surety's liabilities was not in any way affected by the concealed fact; had it been otherwise, there would probably have arisen an obligation to disclose it. But when the amount of liability is not affected, it has been decided that the rule which governs insurances on ships and on lives as to the concealment of facts does not apply to common suretyships and guaranties—that, in insurances on ships or lives, the rule, that if the assured conceal any material facts known to him, even though without fraud, the policy is vitiated, is peculiar to the nature of such contracts, in which, in general, the assured knows, and the underwriter does not know, the circumstances of the voyage or the state of health.<sup>1</sup>

But although the law is so far liberal in its rule as to what facts a creditor is bound to disclose, there are cases where it has been held that a concealment of a material fact, *part of the immediate transaction*, discharges the surety. Thus, in *Pidcock v. Bishop*,<sup>2</sup> it was agreed between the vendors and the

[Rule as to concealment in insurances inapplicable to common suretyships.]

Or (2) the material fact concealed must have been an integral part of the immediate transaction.

<sup>1</sup> North British Insurance Co. v. Lloyd, 10 Exch. 523; Wythes v. Labouchere, 3 De G. & J. 593.

<sup>2</sup> 3 B. & C. 605.

vendee of goods that the latter should pay 10s. per ton beyond the market price in liquidation of an old debt due to one of the vendors. The payment of the goods was guaranteed by a third party in the following words:—"I will guaranty you in the payment of £200 *value*, to be delivered to Tickell, in Lightmoor pig-iron." The private bargain between the parties was not communicated to the surety. It was held that this was a fraud on the surety—that a party giving a guarantee ought to be informed of any private bargain between the vendor and the vendee which might have the effect of varying his responsibility—that the effect of the transaction would be to compel the vendor to appropriate to the payment of the old debt a portion of those funds which the surety might reasonably suppose would go towards defraying the debt for the payment of which he had made himself collaterally liable, and that such a bargain therefore increased his responsibilities.<sup>1</sup>

Creditor not bound to inquire as to circumstances of suretyship, if there is no ground to suspect fraud on surety; *seems*, if reasonable ground of suspicion.

It seems to follow that, as a general rule, a creditor is not bound to inquire into the circumstances under which a third party becomes to him surety for a debt, but that in exceptional circumstances, he will be bound to inquire, as, for example, where the dealings between the parties are such as would reasonably create a suspicion that a fraud is being practised upon the surety. Thus, in *Owen v. Homan*,<sup>2</sup> A. being largely indebted to B. & Company, and being on the verge of bankruptcy, brought them, on different occasions, bills, &c., signed by himself and his aunt, as surety. The aunt was, to the knowledge of B. & Company, a married woman, aged 75, and living apart from her husband. It was held that the circumstances were such as reasonably to create in the minds of the bankers a

<sup>1</sup> Maltby's Case, cited 1 Dow. 294.

<sup>2</sup> 4 H. L. Cas. 997.

suspicion of fraud on the part of the debtor towards his aunt; that they could not shelter themselves under the plea that they were not called on to ask and did not ask any questions on the subject, for that, in such cases, wilful ignorance is not to be distinguished in its equitable consequences from knowledge.<sup>1</sup>

The rights of the creditor as against the principal debtor may or may not depend upon the instrument of guaranty; but the rights of the creditor as against the surety are wholly regulated by the terms of that instrument. When an obligation exists only in virtue of a covenant, its extent can be measured only by the words in which the covenant is expressed.<sup>2</sup> In all cases, therefore, where a surety is bound by a joint-bond, the court will not reform the joint-bond so as to make it several, upon the presumption of a mistake from the nature of the transaction; but it will require positive proof of an express agreement by the surety that it should be several as well as joint.<sup>3</sup>

Rights of creditor against surety regulated by the instrument of guaranty.

It would seem, that a surety cannot compel the creditor to proceed against the debtor, and practically there is no hardship in the case;<sup>4</sup> for at any moment after the debt becomes payable, the surety may himself pay off the creditor, and proceed against the debtor for the money so paid.<sup>5</sup>

Surety cannot compel creditor to proceed against debtor.

But on the other hand, a surety has a right to come into equity, to take proceedings in the nature of *quia timet*, to compel the debtor to pay the debt when due, whether the surety has actually been sued on it or not; for it is "unreasonable that a man

Remedies available for surety. (1.) Bill *quia timet* to compel payment by debtor.

<sup>1</sup> Maitland v. Irving, 15 Sim. 437.

<sup>2</sup> Sumner v. Powell, 2 Mer. 35, 36.

<sup>3</sup> Rawstone v. Parr, 3 Russ. 424 & 539.

<sup>4</sup> But see Newton v. Charlton, 10 Hare, 646.

<sup>5</sup> Wright v. Simpson, 6 Ves. 733.

should always have a cloud hanging over him."<sup>1</sup> But this right only arises where the creditor has a present right to sue his debtor, and refuses to exercise that right.<sup>2</sup>

(2.) Judicial declaration that surety discharged.

Similarly a surety may file a bill for a declaration that his liability is at an end, where the course of dealing between principal debtor and creditor has operated as a release.<sup>3</sup>

(3.) Action for reimbursement by debtor.

Where the surety pays the debt on behalf of the principal debtor, the rule, whether at law<sup>4</sup> or in equity, is that he has a right to call upon such debtor for reimbursement. And this right has been put upon the ground of an implied contract on the part of the debtor to repay the money so paid on his account, where there is no express promise creating the right.<sup>5</sup>

(4.) Action for delivery up of securities by creditor to surety on paying the debt.

If, in addition to the security given by the surety, the creditor has taken some additional or collateral securities from the principal debtor, courts of equity have held that upon payment of the debt by the surety to the creditor, the surety is entitled to have the benefit, not only of the principal security, but also of all those collateral securities thus given by the debtor to the creditor. Thus, for example, if at the time when the bond of the principal and surety is given, a mortgage is also made by the principal to the creditor as an additional security for the debt, then, if the surety pays the debt, he will be entitled to have an assignment of the mortgage, and to stand in the place of the mortgagee.<sup>6</sup>

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<sup>1</sup> *Ranelaugh v. Hayes*, 1 Vern. 189; *Mitford on Plead.* 172; *Antrobus v. Davidson*, 3 Mer. 569; *Wooldridge v. Norris*, L. R. 6 Eq. 410. [*Dempsey v. Bush*, 18 Ohio St. 376.]

<sup>2</sup> *Padwick v. Stanley*, 9 Hare, 627. [See *Bisph. Eq.* §539.]

<sup>3</sup> *Wilson v. Lloyd*, 21 W. R. 507.

<sup>4</sup> *Toussaint v. Martinnant*, 2 T. R. 105.

<sup>5</sup> *Craythorne v. Swinburne*, 14 Ves. 162.

<sup>6</sup> *Story* 499; *Hodgson v. Shaw*, 3 My. & Keen, 190. [*Moses v.*



Where a debt is secured by the suretyship of two or more persons, and one surety pays the whole or part of the debt, he has in equity, and to a certain extent also at law, a right to contribution from his co-surety; and this doctrine of "contribution is bot-tomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it."<sup>1</sup> Hence it follows that the doc-trine of contribution applies whether the parties are bound in the same or in different instruments, pro-vided they are co-sureties for the same principal and in the same engagement, even though they are ignorant of the mutual relation of suretyship; and further, there is no difference if they are bound in different sums, except that the contribution could not be required beyond the sum for which they are respectively bound.<sup>2</sup>

In certain respects, the jurisdiction at common law used to be less beneficial than the jurisdiction in equity. Thus, where there were several sureties, and one became insolvent, the surety who paid the entire debt could in equity compel the solvent sure-ties to contribute towards payment of the entire debt;<sup>3</sup> but at law he could recover only an aliquot part of the whole, regard being had to the original number of co-sureties.<sup>4</sup> Suppose, for instance, there were three sureties, and one of them became insolvent, if one of the remaining solvent sureties paid

(5.) Action against co-sure-ties for contribu-tion.

Differences be-tween law and equity, as regards suretyship,—now abolished: (1.) Extent of remedy over for contribution.

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Murgatroyd, 1 Johns. Ch. 129; Burwell v. Fauber, 21 Gratt. 447.]

<sup>1</sup> Dering v. Winchelsea, 1 Smith L. C. 106; Coope v. Twynam, 1 T. & R. 426.

<sup>2</sup> Dering v. Winchelsea, 1 Smith L. C. 106; Whiting v. Burke, L. R. 6 Ch. 342.

<sup>3</sup> Hitchman v. Stewart, 3 Drew. 271; Mayor of Berwick v. Murray, 7 De G. M. & G. 497.

<sup>4</sup> Cowell v. Edwards, 2 B. & P. 268; Batard v. Hawes, 2 Ell. & B. 287.

the debt, he might in equity compel the other solvent surety to contribute a moiety; at law he could only recover one-third in any case from the solvent co-surety. But that distinction and all other distinctions between law and equity have now been abolished, and the rules of equity are made to prevail.<sup>1</sup> It seems, however, that if one of the sureties died, contribution could, and it certainly now can, be enforced against his representatives, both at law and in equity.<sup>2</sup>

General principles regarding sureties:—  
(1.) Surety may limit his liability by express contract.

Although the doctrine of contribution is founded upon the general equity of the case, and not upon contract, still a person may by express contract take himself either wholly or partially out of the operation of that doctrine. Thus, where three persons became sureties, and agreed among themselves that if the principal debtor failed to pay the debt, they should pay only their respective aliquot parts; and afterwards one of them became insolvent, and one of the remaining solvent sureties paid the whole debt, it was held that he was entitled to recover only one-third from the other solvent surety.<sup>3</sup>

(2.) Surety can only charge debtor for what he actually paid.

Where a surety discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the debt.<sup>4</sup>

Circumstances discharging the surety.  
(1.) If creditor varies contract with debtor without surety's privity.

A surety will be discharged from his liability, where by acts *subsequent* to the contract for suretyship his position has been essentially changed without his consent. Thus, where a person gave a promissory note as a surety, upon an agreement

<sup>1</sup> Judicature Act, 1873, s. 25, sub-sect. 11.

<sup>2</sup> *Primose v. Bromley*, 1 Atk. 88; *Batard v. Hawes*, 2 Ell. & B. 287.

<sup>3</sup> *Swain v. Wall*, 1 Ch. R. 149; *Craythorne v. Swinburne*, 14 Ves. 165; *Coope v. Twynam*, 1 T. & R. 426.

<sup>4</sup> *Reed v. Norris*, 2 My. & Cr. 361, 375.

that the amount should be advanced to the principal debtor, by draft at three months' date, and the creditor, without the concurrence of the surety, paid the amount at once; it was held that the agreement had been varied, and the surety was therefore discharged.<sup>1</sup> But if the variation of liability is in reality in relief *pro tanto* of the surety, *e. g.*, part payment by the principal debtor being accepted by the principal creditor in discharge of the whole liability, the surety is not discharged.<sup>2</sup>

"If a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of *positive contract* between the creditor and the principal debtor, not where the creditor is merely inactive. And the surety is held to be discharged for this reason, because the creditor by giving time to the principal has for the time at least put it out of the power of the surety to consider whether he (the surety) will have recourse to his remedy against the principal debtor or not, and because he, the surety, cannot in fact have the same remedy against the principal as he would have had under the original contract."<sup>3</sup> It seems, however, that a surety will not be discharged by the creditor's giving time to the debtor, if the creditor's remedies against the surety are not thereby diminished or affected, but are accelerated, because in such a case,

(2.) If creditor gives time in a binding manner to debtor without consent of surety, and thereby affects the remedies of the surety.

*secus*, if remedies of surety not thereby affected.

<sup>1</sup> *Bonser v. Cox*, 6 Beav. 110; *Calvert v. Lond. Dock Co.*, 2 Keen, 638; *Evans v. Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 101; *Holme v. Brunskill*, 3 Q. B. Div. 495.

<sup>2</sup> *Webster v. Petré*, 4 Exch. Div. 127.

<sup>3</sup> *Samuell v. Howorth*, 3 Mer. 272; *Wright v. Simpson*, 6 Ves. 734; *Rees v. Berrington*, 2 Smith L. C. 992; *Bailey v. Edwards*, 4 B. & S. 711; 12 W. R. 337; *Davies v. Stainbank*, 6 De G. M. & G. 679.

the surety's remedies against the principal debtor remain also unaffected.<sup>1</sup>

Or, if creditor giving time reserves his rights against surety.

Nor will the surety be discharged if the creditor, on giving further time to the principal debtor, reserve his right to proceed against the surety; "for when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial."<sup>2</sup>

(3.) If the creditor releases the principal debtor.

And the rule is the same when the principal debtor purports to be released, but the creditor reserves his rights against the surety. But where the purported release is in general terms, the surety will be discharged, and that not from any equity in his favor, but on principles of bare justice to the principal debtor. For "it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in his turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety there no fraud on the principal debtor."<sup>3</sup>

(3a.) If the creditor releases one co-surety.

It seems to be a settled principle at law that a release or discharge of one surety by the creditor, even when founded on a mistake of law, operates as a discharge of the others.<sup>4</sup>

Seeus, if creditor merely covenants not to sue the principal debtor or one co-surety.

But though a release of one surety is a discharge of his co-sureties, still if the release can be con-

<sup>1</sup> Hulme v. Coles, 2 Sim. 12; Prendergast v. Devey, 6 Mad. 124; Price v. Edmunds, 10 B. & C. 578.

<sup>2</sup> Webb v. Hewitt, 3 K. & J. 442; Boulton v. Stubbs, 17 Ves. 26; Wyke v. Rogers, 1 De G. M. & G. 408.

<sup>3</sup> Per Mellish, L. J., in Nevill's Case, L. R. 6 Ch. 47.

<sup>4</sup> Cheetham v. Ward, 1 B. & P. 633; Nicholson v. Revell, 4 A. & E. 675; *Ex parte Jacobs*, *In re Jacobs*. L. R. 10 Ch. App. 211

strued as a *covenant not to sue*, it will not operate as a discharge of the co-sureties.<sup>1</sup> And the same rule applies to a covenant not to sue the principal debtor.

Although a creditor upon giving time to the principal debtor, or on covenanting not to sue him, may reserve his right against the sureties, he cannot do so if he give to the debtor what amounts to an *actual release*, for the debt is in the latter case gone at law. It was therefore held that, where there was an agreement between a bond debtor and his creditor for the latter to take all the debtor's property, and to pay the other creditors five shillings in the pound, though it was not a discharge of the bond at law by way of accord and satisfaction, still it operated in equity as a satisfaction of the debt, and it was not possible in equity upon such a transaction to reserve any rights against the surety; and any attempt to do so would be void, as being inconsistent with the agreement.<sup>2</sup>

A surety being entitled on payment of the debt to all the securities which the creditor has against the principal, whether such securities were given at the time of the contract of suretyship, with or without the knowledge of the surety,<sup>3</sup> or whether they were given after that contract, with or without the knowledge of the surety,<sup>4</sup> it follows that, if a creditor who has had, or ought to have had, such securities, loses them, or suffers them to get back into the possession of the debtor, or does not make them effectual by giving proper notice,<sup>5</sup> the surety,

Creditor cannot reserve his rights against surety, if he release the principal debtor, or one co-surety.

(4.) If creditor loses or allows securities to go back into debtor's hands.

<sup>1</sup> Price v. Barker, 4 Ell. & Bl. 777; Bailey v. Edwards, 4 B. & S. 761; *Ex parte Good*, *In re Armitage*, L. R. 5 Ch. Div. 46.

<sup>2</sup> Webb v. Hewitt, 3 K. & J. 438; Nicholson v. Revell, 4 Ad. & Ell. 675; Kearsley v. Cole, 16 Mees. & W. 128.

<sup>3</sup> Mayhew v. Crickett, 2 Swanst. 185.

<sup>4</sup> Pearl v. Deacon, 24 Beav. 186; 1 De G. & J. 461; Lake v. Brutton, 18 Beav. 34; 8 De G. M. & G. 440; Pledge v. Buss Johnson, 663, 668.

<sup>5</sup> Strange v. Fooks, 4 Giff. 408.

to the extent of such security, will be discharged.<sup>1</sup> So where a creditor, by neglecting the statutory formalities, lost the benefit of an execution under a warrant of attorney, which according to the agreement of suretyship, he had proceeded to enforce, upon a notice by the surety, it was held that the surety was thereby discharged.<sup>2</sup>

Marshalling of securities,—as against sureties.

On page 268, *supra*, certain general rules (there given) regarding the marshalling of securities were stated to be applicable as against sureties also.<sup>3</sup>

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<sup>1</sup> Capel v. Butler, 2 S. & S. 457; Law v. E. I. Co., 4 Ves. 824.

<sup>2</sup> Watson v. Alcock, 1 Sm. & Giff. 319; 4 De G. M. & G. 242; Mayhew v. Crickett, 2 Swanst. 185, 190.

<sup>3</sup> Kinnaird v. Webster, 10 Ch. Div. 139.

## CHAPTER VI.

## PARTNERSHIP.

Courts of equity exercise a full concurrent juris- Partnership.  
 diction with courts of law in all matters of partner-  
 ship; indeed it may be said that the jurisdiction of Equity has a  
 courts of equity is, practically speaking, an exclu- practically ex-  
 sive jurisdiction in all cases of any complexity or clusive jurisdic-  
 difficulty. For wherever a discovery, or an account, tion.  
 or a contribution, or an injunction, or a dissolution  
 is sought in cases of partnership, or where a due  
 enforcement of partnership rights, duties, and  
 credits is required, the remedial justice administered  
 by courts of equity is far more complete, extensive  
 and various, adapting itself to the particular nature  
 of the grievance, and granting relief in the most  
 beneficial and effectual manner, where no redress  
 whatsoever, or very imperfect redress, could be ob-  
 tained at law.

A court of equity will decree the specific per- Specific perform-  
 formance of a contract to enter into partnership for ance of partner-  
 a fixed and definite period of time;<sup>1</sup> but it will not ship agreement—  
 do so when no term has been fixed, for such a de- when and when  
 cree would be useless when either of the parties not decreed.

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<sup>1</sup> Buxton v. Lister, 3 Atk. 385; England v. Curling, 8 Beav.  
 129.

might dissolve the partnership immediately afterwards.<sup>1</sup> And it will not decree specific performance, even where a definite term has been fixed, unless there have been acts of part performance.<sup>2</sup>

Injunction,—  
when and when  
not granted.

In like manner, after the commencement and during the continuance of the partnership, courts of equity will in many cases interpose to decree a specific performance of other agreements in the articles of partnership. If, for instance, there be an agreement to insert the name of a partner in the name of the firm, so as to clothe him publicly with all the rights of acting for the partnership, and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name, courts of equity will grant specific relief by an injunction against the use of any other firm name, not including his name. But the remedy in such cases is strictly confined to cases of studied delay and omission, and relief will not be given for a temporary, accidental, or trifling omission.<sup>3</sup> So where there is an agreement by the partners not to engage in any other business, courts of equity will act by injunction to enforce it; and if profits have been made by any partner in violation of such an agreement in any other business, the profits will be decreed to belong to the partnership.<sup>4</sup> A court of equity will further interfere by injunction to prevent such acts on the part of any of the partners, as either tend to the destruction of the partnership property,<sup>5</sup> or to impose an improper liability on the

(1.) Against  
omission of name  
of one of the  
partners.

(2.) Against  
carrying on  
another business.

(3.) Against de-  
struction of  
partnership  
property.

<sup>1</sup> *Hervey v. Birch*, 9 Ves. 357; *Mr. Swanston's Note to Crawshay v. Maule*, 1 Swanst. 511-513.

<sup>2</sup> *Scott v. Rayment*, L. R. 7 Eq. 112.

<sup>3</sup> *Marshall v. Colman*, 2 J. & W. 266, 269.

<sup>4</sup> *Somerville v. Mackay*, 16 Ves. 382, 387, 389; *England v. Curling*, 8 Beav. 129.

<sup>5</sup> *Miles v. Thomas*, 9 Sim. 606, 609; *Marshall v. Watson*, 25 Beav. 501.



others, or to the exclusion of the other partners from the exercise of their partnership rights, whether those rights be founded on the law relating to partnerships in general, or on agreement,<sup>1</sup> and although no dissolution is prayed.<sup>2</sup>

But it is not to be inferred that courts of equity will in all cases interfere to enforce a specific performance of the articles of partnership, or to issue an injunction against the breach of these articles.

(4.) Against exclusion of partner.  
Courts of equity will not enforce specific performance of articles where remedy at law is entirely adequate.

Where the remedy at law is entirely adequate, no relief will be granted in equity. So, where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement, in case of any disputes, to refer the same to arbitration, courts of equity would not, any more than courts of law, interfere as a general rule to enforce that agreement.<sup>3</sup>

A partnership may be dissolved in various ways.

Dissolution of partnership,—  
modes of.  
(1.) By operation of law.

I. By operation of law. Of events on which by operation of law the partnership is determined, the principal ones seem to be the death of one of the partners, unless there be an express stipulation to the contrary;<sup>4</sup> the bankruptcy of all or one of the partners;<sup>5</sup> the conviction of any one of them for felony;<sup>6</sup> or a general assignment by one or more of the partners, whether the partnership be determinable at will, or, it seems, even where it is for a definite period.<sup>7</sup> To these may, perhaps, be added any

<sup>1</sup> Deitrichsen v. Cabburn, 2 Ph. 59.

<sup>2</sup> Hall v. Hall, 12 Beav. 414.

<sup>3</sup> Street v. Rigby, 6 Ves. 815; British Emp. Shipping Co. v. Somes, 2 K. & J. 433.

<sup>4</sup> Gillespie v. Hamilton, 3 Mad. 251; Crawshay v. Maule, 1 Swanst. 495; and see Backhouse v. Charlton, 8 Ch. Div. 444.

<sup>5</sup> Barker v. Goodair, 11 Ves. 83, 86; Crawshay v. Collins, 15 Ves. 228.

<sup>6</sup> 2 Bl. Com. 409; Co. Litt. 391 a.

<sup>7</sup> Heath v. Sansom, 4 B. & Ad. 172; Nerot v. Burnard, 4 Russ. 247.

event which makes either the partnership itself, or the objects for which it was formed, illegal.<sup>1</sup> In these cases the partnership determines by operation of law from the happening of the particular event, without any option of any of the parties.

2. By agreement of parties.

2. By agreement of parties. By mutual agreement of *all* the partners, the partnership, though for an unexpired term, may be put an end to.<sup>2</sup>

Partnership at will may be dissolved at any moment.

Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases; and the partnership will then be deemed to continue only so far as may be necessary for the purposes of winding up its then pending affairs.<sup>3</sup> But at the same time, the Court of Chancery would restrain an immediate dissolution and sale of the partnership property, if it appeared that irreparable mischief would ensue from such a proceeding.<sup>4</sup>

Dissolution by event provided for.

A partnership may also expire by the efflux of the time fixed upon by the partners for the limit of its duration.<sup>5</sup>

Partnership continuing after term agreed on, is a partnership at will, on old terms.

But in the case of a partnership for a term, if after the term the business is carried on as before, instead of being wound up according to the terms of the articles, or by sale as required by law in the absence of special provisions, the partnership will continue, and will be deemed a partnership at will upon the terms of the original partnership, so far as those terms are applicable.<sup>6</sup>

<sup>1</sup> *Esposito v. Bowden*, 7 E. & B. 763, 785; *Dixon on Partnership*, 431, 432.

<sup>2</sup> *Hall v. Hall*, 12 Beav. 414. [*Skinner v. Dayton*, 19 Johns. 538.]

<sup>3</sup> *Peacock v. Peacock*, 16 Ves. 50.

<sup>4</sup> *Lindley on Partnership*. 232; *Blisset v. Daniel*, 10 Hare, 493; see *Pothier Partn.* s. 150; also *Levy v. Walker*, 10 Ch. Div. 436.

<sup>5</sup> *Featherstonhaugh v. Fenwick*, 17 Ves. 298-307.

<sup>6</sup> *Parsons v. Hayward*, 31 Beav. 199; 31 L. J. Ch. 666.

3. Dissolution by decree of a court of equity. A <sup>3. By decree of court.</sup> court of equity will, in many cases, decree a dissolution at the instance of a partner, though he cannot by his own act dissolve the partnership. The following are the principal cases in which, and grounds upon which, the court has decreed a dissolution:—

(a.) A partnership may be dissolved as from its commencement, where it has originated in fraud, <sup>Partnership induced by fraud.</sup> misrepresentation, or oppression.<sup>1</sup>

(b.) If one partner grossly misconducts himself <sup>Gross misconduct and breach of trust.</sup> in reference to partnership matters, acting in breach of the trust and confidence between the partners, this will be a ground for a dissolution.<sup>2</sup>

(c.) So, if there have been continual breaches of <sup>Continual breaches of contract.</sup> the partnership contract, by one of the parties, as if he has persisted in carrying on the business in a manner totally different from that agreed on, the court will dissolve the partnership.<sup>3</sup> But there must be a substantial failure in the performance of the agreement on the part of the defendant; it is not the office of a court of equity to enter into a consideration of mere partnership squabbles.<sup>4</sup>

(d.) If a partner who ought to attend to the business, wilfully and permanently absents himself <sup>Wilful and permanent neglect of business.</sup> from it, or becomes so engrossed in his private affairs as to be unable to attend to it, this would seem, independently of agreement, to be a ground for dissolution.<sup>5</sup>

<sup>1</sup> *Rawlins v. Wickham*, 1 Giff. 335; 7 W. R. 145; *Hue v. Richards*, 2 Beav. 305.

<sup>2</sup> *Smith v. Jeyes*, 4 Beav. 503; *Harrison v. Tennant*, 21 Beav. 482. [*Berry v. Cross*, 3 Sandf. Ch. 1; *Kennedy v. Kennedy*, 3 Dana, 239.]

<sup>3</sup> *Waters v. Taylor*, 2 V. & B. 299.

<sup>4</sup> *Wray v. Hutchinson*, 2 My. & K. 235; *Anderson v. Anderson*, 25 Beav. 190.

<sup>5</sup> *Harrison v. Tennant*, 21 Beav. 482; *Smith v. Mules*, 9 Hare, 556.

Extreme disagreements or incompatibility of temper.

(e.) And although the court will not dissolve a partnership merely on account of the disagreement or incompatibility of temper of the partners, where there has been no breach of the contract;<sup>1</sup> yet, if the disagreements are so great as to render it impossible to carry on the business, all mutual confidence being destroyed, there cannot be a doubt that the court will dissolve the partnership.<sup>2</sup>

Insanity of partner,—whose skill is indispensable.

(f.) Whenever a partner, who is to contribute his skill and industry in carrying on the business, or who has a right to a voice in the partnership, becomes permanently insane, a court of equity will dissolve the partnership.<sup>3</sup> Insanity of a partner is not, however, in the absence of agreement, *ipso facto* a dissolution, but is only a ground (the case being otherwise proper) for dissolution by decree of the court.<sup>4</sup>

Share in partnership a right to money.

The share of a partner is his proportion of the partnership assets after they have been all realized and converted into money, and all the debts and liabilities of the firm have been paid and discharged; and it is this only which on the death of a partner passes to his representatives.<sup>5</sup>

Account on dissolution. Receiver appointed only in case of dissolution.

Where a dissolution has taken place, not only will an account be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business, and make sale of the partner-

<sup>1</sup> Goodman v. Whitcomb, 1 J. & W. 589, 592; Jauncey v. Knowles, 29 L. J. Ch. 95. [Bishop v. Breckels, 1 Hoff. Ch. 534.]

<sup>2</sup> Baxter v. West, 1 Dr. & Sm. 173; Watney v. Wells, 30 Beav. 56; Leary v. Shout, 33 Beav. 582.

<sup>3</sup> Waters v. Taylor, 2 V. & B. 303; Patey v. Patey, 5 L. J. Ch. N. S. 198; Anon. 2 K. & J. 441; Rowlands v. Evans, 30 Beav. 302. [Isler v. Baker, 6 Humph. 85.]

<sup>4</sup> Jones v. Noy, 2 My. & K. 125. [Davis v. Lane, 10 N. H. 161.]

<sup>5</sup> Lindley on Partnership, 681; Knox v. Gye, L. R. 5 H. L. 656; Noyes v. Crawley, 10 Ch. Div. 31.

ship property, so that a final distribution may be made of the partnership effects; but a manager or receiver will not be appointed except with a view to a dissolution.<sup>1</sup>

As to decreeing an account where no dissolution is intended or prayed, the general rule is, that where a partner has been excluded, or the conduct of the other party has been such as would entitle the complaining partner to a dissolution as against him, a general account, at any rate up to the time of filing the bill, will be decreed; but that in no case will a continuous account be decreed, as that would be, in part at least, a carrying on of the business by the Court of Chancery.<sup>2</sup>

Account where no dissolution is prayed.

A partnership, though in a certain sense expiring on any of the events that have been mentioned—such as death, effluxion of time, or bankruptcy of a partner—does not expire to all purposes; for all the partners are interested in the business until all the affairs of the partnership have been finally settled by all.<sup>3</sup> Hence the partners thus continuing a business are accountable to the rest, not merely for the ordinary profits, but for all the advantages which they have obtained in the course of the business.<sup>4</sup>

Partner making advantage out of the partnership property, accountable to other partners.

But there is no fiduciary relation between the surviving partners and the representatives of the deceased partner; therefore, although they may respectively sue each other in equity, their rights are legal rights for an account, and will be barred by

Representatives of deceased partners entitled to an account, but have no lien.

<sup>1</sup> Story 672; Hall v. Hall, 3 Mac. & G. 79; Baxter v. West, 28 L. J. Ch. 169.

<sup>2</sup> Dixon on Partnership, 193; Story 671; Loscombe v. Russell, 4 Sim. 8; Fairthorne v. Weston, 3 Hare, 387.

<sup>3</sup> Crawshaw v. Collins, 2 Russ. 344.

<sup>4</sup> Clements v. Hall, 2 De G. & J. 173; Willett v. Blanford, 1 Hare, 253; Wedderburn v. Wedderburn, 22 Beav. 84; 2 Sp. 208. And distinguish Dean v. M'Dowell, 8 Ch. Div. 345.

the Statute of Limitations.<sup>1</sup> The representatives, moreover, have no lien on any specific part of the partnership estate, which in the first instance accrues in its entirety to the surviving partners, both at law and in equity.

In equity land forming an asset of the partnership is money.

From the principle that the share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money, and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties.<sup>2</sup>

And personal representative takes.

Immaterial whether land has been purchased or devised, so long as "involved in" the business.

Not only are lands purchased out of partnership funds for partnership purposes, treated in equity as personalty,<sup>3</sup> but the rule is the same in certain cases where lands have been acquired by devise, the question in every case being, as was said by James, L. J., in *Waterer v. Waterer*,<sup>4</sup> whether or not the lands are "*substantially involved in the business.*"

[In the United States lands owned by the partnership, after the partnership liabilities have been settled, remain as land and go to the real and not to the personal representatives of a deceased partner.<sup>5</sup>]

Creditors may, on decease of one partner, go against survivors, or against the estate of deceased.

In cases of partnership debts, on the decease of one partner, the creditors may, at their option, pursue their legal remedies against the survivor, or

<sup>1</sup> *Knox v. Gye*, L. R. 5 H. L. 656.

<sup>2</sup> *Lindley on Partnership*, 687; *Darby v. Darby*, 3 Drew. 495; *Steward v. Blakeway*, L. R. 4 Ch. 603; *Wylie v. Wylie*, Gr. 278.

<sup>3</sup> *Phillips v. Phillips*, 1 M. & K. 649.

<sup>4</sup> L. R. 15 Eq. 402; *Lindley on Partnership*, 687.

<sup>5</sup> *Wilcox v. Wilcox*, 13 Allen 254; *Bisph. Eq.* §§ 512, 513.

resort in equity to the estate of the deceased, and this altogether without regard to the state of the accounts between the partners themselves, or to the ability of the survivors or survivor to pay.<sup>1</sup>

The liability of partners, although sometimes called joint and several, differs in important particulars from a joint and several liability. Thus, although the separate estate of the deceased is liable, yet it is liable only as for a joint debt; consequently the separate creditors of the deceased are entitled to be paid their debts in full, before the creditors of the partnership can claim anything from his separate estate.<sup>2</sup> Hence, a creditor of the partnership, who is also a debtor to the deceased, cannot, in an administration of the deceased's estate, set off his separate debt against the joint debt due to him.<sup>3</sup> But a joint debt contracted in fraud of any of the partners may, at the option of the creditor, be treated as a joint or as a separate debt.<sup>4</sup>

Separate creditors paid out of separate estate before partnership creditors.

On the other hand, the creditors of the partnership have a right to the payment of their debts, out of the partnership funds, before the private creditors of the partners.<sup>5</sup> The rule is the same even although the partnership is ostensible only.<sup>6</sup>

Partnership creditors paid their debts out of partnership funds before separate creditors.

Another illustration of the beneficial result of equity jurisdiction, in cases of partnership, may be found in the case of two firms dealing with each

Two firms having a common partner could not sue one another at law, but might do so in equity.

<sup>1</sup> *Baring v. Noble*, 2 R. & My. 495.

<sup>2</sup> *Gray v. Chiswell*, 9 Ves. 118; *Ridgway v. Clare*, 19 Beav. 111; *Ex parte Wilson*, 3 M. D. & De G. 57.

<sup>3</sup> *Stephenson v. Chiswell*, 3 Ves. 566.

<sup>4</sup> *Ex parte Adamson*, *In re Collie*, 8 Ch. Div. 807.

<sup>5</sup> *Twiss v. Massey*, 1 Atk. 67; *Campbell v. Mullett*, 2 Swanst. 574. And see *Lacey v. Hill*, L. R. 4 Ch. Div. 537, affirmed successively in the Court of Appeal and in the House of Lords. [*Imsbuch v. Farwell*, 1 Black, (U. S.) 566; *Treadwell v. Brown*, 41 N. H. 12.]

<sup>6</sup> *In re Pulsford*, 8 Ch. Div. 11; *Ex parte Sheen*, 6 Ch. Div. 235.

other, where some or all of the partners in one firm are partners with other persons in the other firm. Upon the technical principles of the common law in such cases no suit could be maintained at law in regard to any transactions or debts between the two firms.<sup>1</sup> But there was no difficulty in proceeding in courts of equity to a final adjustment of all the concerns of both firms, in regard to each other; for, in equity, it was sufficient that all parties in interest were before the court as plaintiffs or as defendants, and they need not, as at law, in such a case, have been on opposite sides of the record. In equity, all contracts and dealings between such firms, of a moral and legal nature, were deemed obligatory, though void at law. Courts of equity, in such cases, looked behind the form of the transactions to their substance, and treated the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were, in fact, corporate companies.<sup>2</sup> And the rules of equity now prevail in these respects in all divisions of the court.

At law, one partner cannot sue his co-partners in a partnership transaction—he may in equity.

Upon similar grounds, one partner could not, at law, maintain a suit against his co-partners to recover the amount of money which he had paid for the partnership, since he could not sue them without suing himself, also, as one of the partnership,<sup>3</sup> but he might have done so in equity; and now the rule of equity prevails.

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<sup>1</sup> *Bosanquet v. Wray*, 6 Taunt, 597.

<sup>2</sup> *Mainwaring v. Newman*, 2 B. & P. 120; St. 679, 589; *De Tastet v. Shaw*, 1 B. & A. 664.

<sup>3</sup> *Wright v. Hunter*, 5 Ves. 792; *Bovill v. Hammond*, 6 B. & C. 151; *Sedgwick v. Daniell*, 2 H. & N. 319; *Atwood v. Maude*, L. R. 3 Ch. 369. And see *Brown's Law Dictionary*, title Partnership.



## CHAPTER VII.

## ACCOUNT.

I. The action of account was one of the most I. Account.  
 ancient forms of action at the common law. But  
 the modes of proceeding in that action, although  
 aided from time to time by statute, were found so  
 very dilatory, inconvenient, and unsatisfactory, that  
 as soon as courts of equity began (and they began At common law,  
 very early) to assume jurisdiction in matters of ac- dilatory and in-  
 count, the remedy at law began to decline, and fell convenient.  
 into disuse.

At the common law an action of account lay in When account lay  
 at law.  
 two classes of cases:—

1. Where there was either a privity in deed by 1. In cases of pri-  
 the consent of the party, as against a bailiff, a re- vity of deed or  
 ceiver appointed by the party; or a privity in law, *ex law.*  
*provisione legis*, as against guardians in socage,<sup>1</sup> and  
 their executors and administrators.<sup>2</sup>

2. By the law merchant, one naming himself a 2. Between mer-  
 merchant, might have an account against another, chants.  
 naming him as a merchant, and charge him as a re-  
 ceiver,<sup>3</sup> or against his executors.<sup>4</sup>

<sup>1</sup> Co. Litt. 90 b.

<sup>2</sup> 3 & 4 Anne, c. 16.

<sup>3</sup> Co. Litt. 172 a.; 11 Co. R. 89.

<sup>4</sup> 13 Edw. III. c. 23.

Suitors preferred equity, because of its power of discovery and of administration.

And the reasons for the disuse of the action of account at common law, and its progress in equity, are not hard to find—one ground was, that courts of common law could not compel a discovery from the defendant on his oath; another ground was, that the machinery and administrative powers of the courts of common law were not so well adapted for the purposes of an account as those of the courts of equity.

In what cases equity allows an account

Courts of common law having failed to give due relief in cases of account, suitors were obliged, in most cases to come into equity for that purpose. It now becomes necessary to examine in what cases equity will afford such relief.

1. Principal against agent, subject to the statute of limitations.

1. Equity will assume jurisdiction where there exists a fiduciary relation between the parties; as in favor of a principal against his agent, though not in favor of the agent against the principal. The rule is thus stated by Sir J. Leach: —<sup>1</sup> “The defendants here were agents for the sale of the property of the plaintiff, and whenever such a relation exists a bill will lie for an account; *the plaintiffs can only learn from the discovery of the defendants how they have acted in the execution of their agency.*” But an agent is not precluded from setting up the Statute of Limitations against his principal, unless a confidential relation in the nature of a trust has been created.<sup>2</sup>

Agent cannot have an account against his principal.

It has been argued that if the principal may commence an action against his agent, the agent may likewise do so against his principal; but the rights of principal and agent are not correlative. The right of the principal rests upon the trust and confi-

<sup>1</sup> Mackensie v. Johnston, 4 Mad. 373: [Lynch v. Willard, 6 Johns. Ch. 342.]

<sup>2</sup> In re Hindmarsh, 1 Dr. & Sm. 129; Burdick v. Garrick, L. R. 5 Ch. 233.

dence reposed in the agent, but the agent reposes no such confidence in the principal.<sup>1</sup>

By analogy to the case of principal against agent, <sup>(a.) Patentee</sup> the Court of Chancery decrees an account against <sup>against infringer</sup> the infringer of a patent, on the ground that the patentee may adopt the acts of the defendant as those of an agent. From this principle it follows, that the plaintiff in such a suit must elect between an account and damages. He cannot claim both, and at the same time approbate and reprobate the agency of the defendant.<sup>2</sup>

Cases of account between trustees and *cestui que* <sup>(b.) Cestui que</sup> *trust* may properly be deemed confidential agencies, <sup>trust against trustee.</sup> and are peculiarly within the jurisdiction of courts of equity.<sup>3</sup>

2. It seems that equity will assume jurisdiction <sup>2. Cases of mutual accounts between plaintiff and defendant,</sup> where there are mutual accounts between the plaintiff and the defendant.

As to what are mutual accounts, the best definition is to be found in the judgment in *Phillips v. Phillips*.<sup>4</sup> “I understand a mutual account to mean not merely where one of the two parties has received money and paid it on account of the other, but <sup>“Mutual accounts” — where each of two parties has received and also paid on the other’s account.</sup> *where each of two parties has received and also paid on the other’s account*. I take the reason of that distinction to be, that in the case of proceedings at law, where each of the two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money

<sup>1</sup> *Padwick v. Stanley*, 9 Hare 627; *Smith v. Leveaux*, 33 L. J. Ch. 167.

<sup>2</sup> *Neilson v. Betts*, L. R. 5 H. L. 1.

<sup>3</sup> *Docker v. Somes*, 2 My. & Keen, 664.

<sup>4</sup> 9 Hare, 471.

on his account, but also to enter into evidence of his own receipts and payments—a position of the case which, to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other, it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments. The question is only as to receipts on the one side and payments on the other, and it is a mere question of set-off; but it is otherwise where *each party* has received and paid.”<sup>1</sup>

No account if it is a mere question of set-off.

3. Circumstances of great complication.

3. An action for an account will also lie where there are circumstances of great complication. As to what is the criterion of the amount of complication necessary to give jurisdiction to a court of equity, independently of any other circumstances, the judgment of Lord Redesdale in *O'Connor v. Spaight*,<sup>2</sup> is in point:—“The ground on which I think that this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all necessary accuracy . . . This is a principle on which courts of equity constantly act, by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law.”

The test is—Can the accounts be examined on a trial at *Nisi Prius*?

Chief defences to suit for an account,  
(1.) Stated or settled account.

It is ordinarily a good bar to a suit for an account that the parties have already, in writing, stated and adjusted the items of the account, and struck the balance.<sup>3</sup> In such a case a court of equity will not interfere, for, under such circumstances, an *indebitatus assumpsit* lies at law, and there is no ground

<sup>1</sup> Padwick v. Hurst, 18 Beav. 575; Fluker v. Taylor, 3 Drew. 183.

<sup>2</sup> 1 Sch. & Lefr. 305. [Armstrong v. Gilchrist, 2 Johns. Ch. 424.]

<sup>3</sup> Dawson v. Dawson 1 Atk. 1. [Weed v. Small, 7 Page 573.]

for resorting to equity. If, therefore, there has been an account stated, that may be set up by way of plea, as a bar to all discovery and relief, unless some matter is shown which calls for the interposition of a court of equity. But if there has been any mistake, or omission, or accident or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will, in some cases, direct the whole account to be opened, and taken *de novo*.<sup>1</sup> In other cases, where the mistake, or omission, or inaccuracy or fraud, or imposition, is not shown to affect or stain all the items of the transaction, the court will content itself with allowing the account to stand, with liberty to the plaintiff to surcharge and falsify it—the effect of which is to leave the account, in full force, as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes. The showing an omission, for which credit ought to be given, is a surcharge; the proving an item to be wrongly inserted is a falsification. The *onus probandi* is always on the party having liberty to surcharge and falsify.<sup>2</sup> And this liberty to surcharge and falsify includes an examination not only of errors of fact, but of errors of law. What shall constitute, in the sense of a court of equity, a stated or settled account, is in some measure dependent on the circumstances of each case. An acceptance of an account may be express, or it may be implied from circumstances. Acquiescence in stated accounts, even though for a long time, although it amounts to an admission or pre-

Equity will "open" the whole account if there be mistake or fraud; and in other cases particular items only will be examined, i. e., liberty will be given to "surcharge" and "falsify."

<sup>1</sup> [Bankhead v. Alloway, 6 Cold. 56.]

<sup>2</sup> Pitt v. Cholmondeley, 2 Ves. Sr. 565.

(2.) Laches, and acquiescence.

sumption of their correctness, does not of itself establish the fact of the account having been settled.<sup>1</sup>

The court is generally unwilling to open a settled account, especially after a long time has elapsed, except in cases of apparent fraud. But in cases of settled accounts between trustee and *cestui qui trust*, and other persons standing in confidential relations to one another, where *mala fides* is alleged, there is scarcely any length of time that will prevent the court from opening the account altogether,<sup>2</sup> or at any rate giving liberty to surcharge and falsify.

Broker and banker,—difference between.

And it should be remembered, that a broker is in a fiduciary relation to his client,<sup>3</sup> although a banker is not in any such relation towards his customer.<sup>4</sup> Also, *semble*, an assurance society is not in any fiduciary relation towards the person entitled to the policy moneys, but is rather in the position of a mere stake-holder.<sup>5</sup>

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<sup>1</sup> Hunter v. Belcher, 2 De G. J. & S. 194, 202; Gething v. Keighley, 9 Ch. Div. 547.

<sup>2</sup> Matthews v. Wallwyn, 4 Ves. 125; Todd v. Wilson, 9 Beav. 486; Watson v. Rodwell, L. R. 7 Ch. Div. 625; 11 Ch. Div. 150; and see pp. 168, 169, *supra*.

<sup>3</sup> Ex parte Cooke, In re Strachan, L. R. 4 Ch. Div. 123.

<sup>4</sup> Foley v. Hill, 1 Phill. 405.

<sup>5</sup> Matthew v. Northern Assurance Co., 9 Ch. Div. 80. But see In re Haycock's Policy, 1 Ch. Div. 611; Crossley v. City of Glasgow Life Assurance Co., 4 Ch. Div. 421.

## CHAPTER VIII.

## SET-OFF AND APPROPRIATION OF PAYMENTS.

I. SET-OFF. "Natural equity says that cross de- I. Set-off.  
mands should compensate each other, by deducting  
the less sum from the greater; and that the differ-  
ence is the only sum which can be justly due."<sup>1</sup>

But the common law refused to carry out this prin- At law, not set-  
ciple of justice, and held that where mutual debts off in case of mu-  
were unconnected, they should not be set-off, but tual unconnected  
the respective creditors should sue in independent debts.  
actions for them. The natural sense of mankind  
was shocked at this, and accordingly the legislature  
interfered, firstly, in the case of bankrupts, and  
allowed a set-off at common law in that and a few  
other cases by the statutes of "Set-off."<sup>2</sup>

As to connected accounts of debit and credit, it is As to connected  
certain that both at law and in equity, and without accounts, bal-  
any reference to the last-mentioned statutes, or the ance recoverable  
tribunal in which the cause is depending, the same both at law and  
general principle prevails, that the balance of the in equity.

<sup>1</sup> Green v. Farmer, 4 Burr. 2220.

<sup>2</sup> 4 Anne, c. 17, s. 11; 2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, s. 4. [In the United States, statutes of set-off are in force in every State and have superseded the equity jurisdiction almost altogether. Dale v. Cook, 4 Johns. Ch. 112; Blake v. Langdon 19 Vt. 485.]

accounts only is recoverable; which is, therefore, a virtual adjustment and set-off between the parties.<sup>1</sup>

Cases in which equity allowed, although law did not allow, set-off.

Even equity generally followed the law as to set-off, but with limitations and restrictions. If there was no connection between the demands, then the rule was as at law; but if there was a connection between the demands, equity acted upon it, and allowed a set-off under particular circumstances.<sup>2</sup>

(1.) In the case of mutual independent debts where there was mutual credit.

In the first place, then, it would seem, independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, were accustomed to grant relief in all cases, where there were mutual and independent debts, and there was a mutual credit between the parties, founded at the time upon the existence of some debts, due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, was to be understood a knowledge, on both sides, of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it.<sup>3</sup> Thus, for example, if A. should be indebted to B. in the sum of £10,000 in a bond, and B. should borrow of A. £2000 on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties as to the £2000, as an ultimate set-off, *pro tanto*, against the debt of £10,000. Now, in such a case, a court of law could not set-off these independent debts against each other; but a court of equity would not hesitate to do so, upon the ground either of the presumed intention of the parties, or of what was called a natural equity.<sup>4</sup>

<sup>1</sup> Dale v. Sollet, 4 Burr. 2133.

<sup>2</sup> Rawson v. Samuel, 1 Cr. & Ph. 161, 172, 173.

<sup>3</sup> Ex parte Prescott, 1 Atk. 230.

<sup>4</sup> Lanesborough v. Jones, 1 P. Wms. 326; Jeffs v. Wood, 2 P. Wms. 128.



In the next place, as to equitable debts, or a legal debt on the one side, and an equitable debt on the other, there was great reason to believe that, whenever there was a mutual credit between the parties touching such debts, a set-off was upon that ground alone maintainable in equity; although the mere existence of mutual debts, without such mutual credit, might not even in a case of insolvency, have sustained it.<sup>1</sup> But the mere existence of cross-demands would not have been sufficient to justify a set-off in equity.<sup>2</sup> Indeed, a set-off was ordinarily allowed in equity only when the party seeking the benefit of it could show some equitable ground for being protected against his adversary's demand — the mere existence of cross demands was not sufficient. *A fortiori* a court of equity would not interfere on the ground of an equitable set-off to prevent a party recovering a sum awarded to him for damages for breach of contract, merely because there was an unsettled account between him and the other party, in respect of dealings arising out of the same contract.<sup>3</sup> But now there would be a set-off both at law and in equity in all these cases.

However, where there were cross demands between the parties of such a nature that, if both were recoverable at law, they would be the subject of a set-off, then if either of the demands was a matter of equitable jurisdiction, the set-off would be enforced in equity.<sup>4</sup> As, for example, if a legal debt was due to the defendant by the plaintiff, and the plaintiff was the assignee of a legal debt due to a third person from the plaintiff, which had been duly

(2.) In the case of mutual equitable debts, or a legal debt on one side, and equitable debt on the other, where there was mutual credit as to such debts.

In cross demands which, if recoverable at law, would be a subject of set-off, equity requires.

<sup>1</sup> James v. Kynnier, 5 Ves. 110; Piggett v. Williams, 6 Mad. 95.

<sup>2</sup> Rawson v. Samuel, 1 Cr. & Ph. 161.

<sup>3</sup> Story, 1436; Rawson v. Samuel, 1 Cr. & Ph. 161; Best v. Hill, L. R. 8 C. P. 10.

<sup>4</sup> Clarke v. Cort, 1 Cr. & Ph. 154.

assigned to himself, a court of equity would set-off the one against the other, if both debts could properly be the subject of set-off at law.<sup>1</sup> And now there would be no difficulty in setting off such cross demands either at law or in equity.

In winding up,  
debt not set-off  
against calls.

But a set-off always was, and still will be, prevented by some intervening equity. Thus, a shareholder in a limited company, who is also a creditor, will not, in the event of the company being wound up, be allowed to set-off his debt against calls made on him; but must first pay the amount of all calls due, and then take a dividend ratably with other creditors. In this case the equity of the general creditors intervenes to prevent the set-off; otherwise, in the event of a deficiency of assets, the creditor-shareholder would get an undue preference, and in effect receive 20s. in the pound on the amount of his debt.<sup>2</sup> And there is no set-off of non-actionable claims against an actionable debt.<sup>3</sup> But a solicitor's lien on costs appears to be no longer a bar to a set-off of costs against debt.<sup>4</sup>

Other cases of no  
set-off.

Set-off under  
Bankruptcy Act  
1869, 32 & 33 Vict.,  
c. 71, s. 29.

In Bankruptcy, where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under the bankruptcy, . . . the sum due from one party shall be set-off against any sum due from the other party; and this rule extends to a case of liquidated damages.<sup>5</sup>

<sup>1</sup> Story, 1436 a; Williams v. Davies, 2 Sim. 461.

<sup>2</sup> Grissell's Case, L. R. 1 Ch. 528; Black & Co.'s Case, L. R. 8 P. Ch. 254; but see Brighton Arcade Company v. Dowling, L. R. 3 C. P. 175.

<sup>3</sup> Rawley v. Rawley, 1 Q. B. Div. 460; and see Hodgson v. Fox, 9 Ch. Div. 673.

<sup>4</sup> Pringle v. Gloag, 10 Ch. Div. 676. [Hamer v. Giles 11 Ch. Div. 942.]

<sup>5</sup> Booth v. Hutchinson, L. R. 15 Eq. 30; and see Judicature Act, 1873, s. 25, § 1.

And, *semble*, it extends also to unliquidated damages.<sup>1</sup>

In the next place, courts of equity following the law would not allow a set-off of a joint debt against a separate debt, or, conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they would not allow a set-off of debts accruing in different right; and, therefore, where an executor and trustee of a legacy, who was also the residuary legatee, had become the creditor of the husband and administrator of the deceased legatee, he was not, in the absence of any special agreement, allowed to set-off his debt against the legacy, to which the husband, having survived his wife, the legatee, was as such administrator entitled.<sup>2</sup>

But special circumstances might occur creating an equity which would justify the interposition of the court, even where the cross demands existed in different rights. Thus, in *Ex parte Stephens*,<sup>3</sup> bankers were directed to lay out money in certain annuities, in the name and to the use of S. They did not do so; but, representing that they had done so, made entries and accounted for the dividends accordingly. S. afterwards, relying on their representations, gave a joint and several promissory note, with her brother, to the bank, to secure the brother's private debt to them. The bankers afterwards failed, and their assignees in bankruptcy sued the brother alone. A petition was then presented by S. and her brother, praying that the petitioners might be at liberty to set-off what was due on the note against the debt due by the bankrupt to S., that she might prove for the residue, that the note might be delivered up, and

No set-off of debts accruing in different rights.

Except under special circumstances, as fraud

<sup>1</sup> Bankruptcy Act, 1869, s. 31; Judicature Acts, Order xix., 2, 3.

<sup>2</sup> *Freeman v. Lomas*, 9 Hare, 109; *Lambarde v. Oldet*, 17 Beav. 542; *Bailey v. Finch*, L. R. 7 Q. B. 34.

<sup>3</sup> 11 Ves. 24.

the assignees might be restrained from suing upon it; and it was accordingly so decreed.<sup>1</sup>

II. Appropriation or imputation of payments.

II. Appropriation of payments. Questions as to the appropriation, or, as it is termed in the Roman law, the imputation, of payments, arise in this way. Suppose a person owing another several debts makes a payment to him, the question then arises, to which of these debts shall such payment be appropriated or imputed, — a matter often of considerable importance, not only to the debtor and creditor, but sometimes also to third persons. For instance, suppose A. owes to B. two distinct sums of £100 £100, and A. could set up the Statute of Limitations as a defence to an action for the earlier of the two debts, but not to an action brought for the other, it is clear that if A. paid £100 to B., and that payment could be imputed to the earlier debt, B. could still recover from him another £100; whereas if it were appropriated to the latter debt, he would be without remedy as to the earlier. Again, suppose A. owes B. two sums of £500, for the first of which C. is a surety; if A. pays B. £500, and it is imputed to the first £500, C.'s liability will cease; if it be imputed to the other £500, C.'s liability will remain.<sup>2</sup>

(1.) Debtor has first right to appropriate payments to which debt he chooses at time of payment.

The first rule upon the subject of appropriation is, — that the debtor has the first right to appropriate any payments which he makes to whatever debt, due to his creditor, he may choose to apply it, provided the debtor exercise this option *at the time of making the payment*.<sup>3</sup> And the intention of the person making the payment may not only be manifested

<sup>1</sup> Vulliamy v. Noble, 3 Mer. 593; Ex parte Hanson, 12 Ves. 346; 18 Ves. 232; Cawdor v. Lewis, 1 You. & Coll. Exch. C. 427, 433.

<sup>2</sup> Clayton's Case, 1 Mer. 572; Tudor's L. C. Merc. Law, 17.

<sup>3</sup> Story, 459 c.; Anon. Cro. Eliz. 68.

by him in express terms,<sup>1</sup> but it may be inferred from his conduct at the time of payment, or from the nature of the transaction.<sup>2</sup>

In the next place, where the debtor has himself made no special appropriation of any payment, then the creditor is at liberty to apply that payment to any one or more of the debts which the debtor owes him;<sup>3</sup> and it seems that the creditor need not make an immediate appropriation of it, but may do so at any time, at least before action.<sup>4</sup> This privilege of the creditor, however, must be taken with this limitation, that he has no right to apply a general payment to an item in the account which is in itself illegal and contrary to law.<sup>5</sup>

However, where A. was indebted to B. on several accounts, payment had been made, as for the first instalment of a composition on the several debts; but the arrangement subsequently broke down, owing to the non-payment of the other instalments; it was held, that it was not open to either party subsequently to appropriate the payment of any specific debt; but that, from the nature of the transaction, it must be deemed to have been paid in respect of all the debts ratably.<sup>6</sup>

Where there are two debts, one of them barred by the Statute of Limitations, and a payment is made by the debtor without appropriating the payment, the creditor may appropriate it towards satisfaction

(2.) If debtor omit, the creditor has the next right of appropriation to what debts he chooses.

Statute-barred debts, appropriation; effect of.

<sup>1</sup> Ex parte Imbert, 1 De G. & J. 152.

<sup>2</sup> Young v. English, 7 Beav. 10; Atty-Gen. of Jamaica v. Manderson, 6 Moo. P. C. C. 239, 255; Buchanan v. Kerby, 5 Gr. 332.

<sup>3</sup> Lysaght v. Walker, 5 Bligh, N. S. 1, 28; Re Brown, 2 Gr. 111, 590.

<sup>4</sup> Philpott v. Jones, 4 Nev. and Man. 16; 2 Ad. & Ell. 44; Simson v. Ingham, 2 B. & C. 65.

<sup>5</sup> Wright v. Laing, 3 B. & C. 165; Ribbans v. Crickett, 1 B. & P. 264.

<sup>6</sup> Thomson v. Hudson. L. R. 6 Ch. 320.

(a.) Appropriation will not revive a debt already barred.  
 (b.) A general payment by debtor takes a debt not already barred out of the statute, but does not revive a barred debt.

of the debt already barred; but such an appropriation will have no operation to revive a debt already barred.<sup>1</sup> And where there are several debts, some of which are barred, if a payment is made on account of principal or interest generally, the effect of such payment will be to take out of the operation of the statute any debt which is not barred at the time of payment, but it will not revive a debt which is then barred; and the inference will be that the payment is to be attributed to those not barred.<sup>2</sup>

(3.) If neither debtor nor creditor makes the appropriation, the law makes it.

If neither debtor nor creditor has made any appropriation, then the law will appropriate the payment, it seems, to the earlier, and not, as the Roman law does, to the more burdensome debt.<sup>3</sup>

*Clayton's Case*:—  
 Current account law of appropriation in cases of.

This rule receives its most frequent application in cases of running accounts between parties, where there are various items of debts on one side, and various items of credit on the other side, occurring at different times, as in a banking account. In *Clayton's Case*,<sup>4</sup> on the death of D., a partner in a banking firm, there was a balance of £1713 in favor of C., who had a running account with the firm. After the death of D., the surviving partners became bankrupt; but, before their bankruptcy, C. had drawn out sums to a larger amount than £1713, and had paid in sums still more considerable. It was held that the sums drawn out by C. after the death of D. must be appropriated to the payment of the balance of £1713 then due, and that consequently the estate of D. was discharged from the debt due from the firm at his death, the sums subsequently paid in by C. constituting a new debt, for which the surviving members of the firm were alone liable. In such a case, the sums paid to the creditor are

<sup>1</sup> *Mills v. Fowkes*, 5 Bing. N. C. 455.

<sup>2</sup> *Nash v. Hodgson*, 6 De G. M. & G. 474.

<sup>3</sup> *Mills v. Fowkes*, 5 Bing. N. C. 455. See Pothier *Oblig. by Evans*, 528-535, 561-572.

<sup>4</sup> *Mer.* 585.

deemed to be paid upon the general blended account, and go to extinguish *pro tanto* the balance of the old firm, in the order of the earliest items thereof. "In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. *Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side.* The appropriation is made by the very act of setting the two items against each other. *Upon that principle all accounts current are settled and particularly cash accounts.* When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made. You are not to take the account backwards, and strike the balance at the head, instead of at the foot of it. A man's banker breaks owing him on the whole account a balance of £1000. It would surprise one to hear the customer say, 'I have been fortunate enough to draw out all that I have paid in during the last four years; but there is £1000 which I paid in five years ago, that I hold myself never to have drawn out, and therefore if I can find anybody who was answerable for the debts of the banking house such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week.'"<sup>1</sup>

The account is not to be taken backwards, and the balance struck at the head instead of the foot.

<sup>1</sup> Judgments in Clayton's Case, 1 Mer. 608, 609; Palmer's Case, 1 Mer. 623, 624; Sleech's Case, 1 Mer. 539. And see (for the law as to the appropriation of securities when there is a double bankruptcy, Ex parte Warning, 19 Ves. 345; Ex parte Gomez, In re Yglesias, L. R. 10 Ch. App. 639; and distinguish Vaughan v. Halliday, L. R. 9 Ch. App. 561; Ex parte Kelly & Co., In re Smith, Fleming, & Co., 11 Ch. Div. 306.

## CHAPTER IX.

## SPECIFIC PERFORMANCE.

**Breach of contract at common law a question of damages.**

By the common law every executory contract to sell or transfer a thing is treated as a merely personal contract, and, if left unperformed by the party, no redress can be had excepting in damages. The common law thus allows the party the election either to pay damages or to perform the contract at his sole pleasure. But courts of equity have deemed such a course wholly inadequate for the purposes of justice, and they have not hesitated to interpose and require from the conscience of the offending party a strict performance of what he cannot, without manifest fraud or wrong, refuse.

**In equity, contract must be exactly performed.**

**Inadequacy of remedy at law, ground of equity jurisdiction.**

The ground of the jurisdiction in equity being the inadequacy of the remedy at law, it follows, as a general principle, that where damages at law will give a party the full compensation to which he is entitled, and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere.<sup>1</sup>

**Cases in which equity will not decree specific performance of an agreement or contract,—**

There are, however, certain cases where equity refuses to interfere to compel specific performance, without taking into consideration the question

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<sup>1</sup> Harnett v. Yielding, 2 Sch. & Lef. 553.



whether adequate relief can be obtained at law or not.

The court will not decree specific performance of an agreement to do an action immoral or contrary to the law. As expressed by Sir William Grant, "You cannot stir a step but through the illegal agreement, and it is impossible for the court to enforce it."<sup>1</sup>

(1.) An illegal or immoral contract.

So again, a court of equity will not enforce specific performance of an agreement without consideration. In *Jeffreys v. Jeffreys*,<sup>2</sup> a father, by voluntary settlement, having conveyed certain freeholds, and covenanted to surrender certain copyholds to trustees in trust for his daughters, afterwards devised the same freehold and copyhold estates to his widow. A suit was instituted by the daughters against the widow to have the trusts of the settlement carried out. The Lord Chancellor said, "The title of the plaintiffs to the FREEHOLDS is complete; and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned. With respect to the COPYHOLDS, I have no doubt that *the court will not execute a voluntary contract*."

(2.) An agreement without consideration.

The incapacity of a court to compel the complete execution of a contract in certain cases, limits its jurisdiction to compel specific performance. This principle is most frequently illustrated in cases of agreements to do acts involving personal skill, knowledge, or inclination. Thus in *Lumley v. Wagner*,<sup>3</sup> a lady agreed in writing with a theatrical manager to sing at his theatre for a definite period. By a clause subsequently agreed to by her, she engaged not to use her talents at any other theatre or concert-room, without the written authorization of the manager.

(3.) A contract which the court cannot enforce. (a.) Where personal skill is required.

<sup>1</sup> Thomson v. Thomson, 7 Ves. 470; Ewing v. Osbaldiston, 2 My. & Cr. 53. [Evans v. Kittrell, 33 Ala. 449.]

<sup>2</sup> Cr. & Ph. 141. [Lear v. Choteau, 23 Ill. 39.]

<sup>3</sup> 5 De G. & Sm. 485; 1 De G. M. & G. 604.

(b.) Contracts to transfer good-will of a business without the premises.

(c.) Contracts to build or repair not enforced, because they are generally too uncertain.

(d.) Revocable contract.

The lady engaged with the manager of a rival theatre within the defined period. It was held, that though the court would restrain the lady from singing at any other theatre, it could not compel her to sing at the theatre of the plaintiff according to her agreement.<sup>1</sup> It is on the same principle that the court refuses specific performance of an agreement for the sale of good-will of a business unconnected with the business premises, by reason of the uncertainty of the subject-matter, and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it.<sup>2</sup> Again, it seems to be now settled that the court will not interfere in cases of contracts to build or repair. "There is no case of a specific performance decreed of an agreement to build a house, because if A. will not do it, B. may. A specific performance is only decreed where the party wants the thing *in specie*, and cannot have it any other way."<sup>3</sup> In the case of building contracts the plaintiff has an adequate, perhaps a better, remedy in damages.<sup>4</sup> Another reason for the refusal of courts of equity to decree specific performance of agreements to build is, that such contracts are for the most part too uncertain to enable the court to carry them out.<sup>5</sup> It seems, however, that where such an agreement is clear and definite in its nature, the court might without much difficulty entertain a suit for its performance.<sup>6</sup> So again, the court will not enforce a contract which is in its na-

<sup>1</sup> *Martin v. Nutkin*, 2 P. Wms. 266; *Dietrichsen v. Cabburn*, 2 Phil. 52.

<sup>2</sup> *Baxter v. Conolly*, 1 J. & W. 576; *Darbey v. Whittaker*, 4 Drew. 134, 139, 140.

<sup>3</sup> *Errington v. Aynesly*, 2 Bro. C. C. 343.

<sup>4</sup> *South Wales Railway Co., v. Wythes*, 1 K. & J. 186; 5 De G. M. & G. 880.

<sup>5</sup> *Mosley v. Virgin*, 3 Ves. 184.

<sup>6</sup> *Mosely v. Virgin*, 3 Ves. 184; *Baumann v. James*, L. R. 3 Ch. 508; *Lucas v. Comerford*, 1 Ves. 235.

ture revocable, for its interference in such a case would be idle, inasmuch as what it had done might be instantly undone by either of the parties. It is on this principle that the court generally refuses to interfere in cases of agreements to enter into partnership, which do not specify the duration of the partnership, — that relation, unless otherwise provided, being dissoluble at the will of either party.<sup>1</sup>

Where the specific performance of a contract will be decreed upon the application of one party, courts of equity will maintain the like suit at the instance of the other party, although the relief sought by him is merely in the nature of a compensation in damages or value; for in all such cases the court acts upon the ground that the remedy, if it exists at all, ought to be mutual and reciprocal, as well for the vendor as for the purchaser.<sup>2</sup> It follows, therefore, that an infant cannot sustain a bill for specific performance, for a court of equity will not compel a specific performance as against him.<sup>3</sup> An apparent but no real exception is that arising under the Statute of Frauds, where a plaintiff may obtain a decree for specific performance of a contract signed by the defendant although not signed by the plaintiff, who if sued on his part would not have been liable. But such “cases are supported, first because the Statute of Frauds<sup>4</sup> only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff by the act of filing the bill has made the remedy mutual. Neither of these reasons applies to the case of an infant. The act of

(4.) Contract wanting in mutuality.

Statute of Frauds no exception to this rule, excepting in appearance.

<sup>1</sup> *Hercy v. Birch*, 9 Ves. 357; *Sturge v. Mid. Rail. Co.*, 6 W. R. 233.

<sup>2</sup> *Adderly v. Dixon* 1 S. & S. 607. [*Marble Co., v. Ripley*, 10 Wall. 339.]

<sup>3</sup> *Flight v. Bolland*, 4 Russ. 301.

<sup>4</sup> 29 Car. II. c. 3.

filing the bill by his 'next friend' cannot bind him."<sup>1</sup>

Division of subject, according as the property is realty or is personalty.

Having premised these general observations, it is proposed to treat the subject under two heads, with regard to —

I. Contracts respecting chattels personal.

II. Contracts respecting land.

No essential difference between realty and personalty. Contracts as to realty enforced, because remedy at law is inadequate.

In making this distinction, however, it is necessary to remember that courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal value, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock of goods contracted for; inasmuch as with the damages he may purchase the same quantity of the like stock of goods.<sup>2</sup>

*Secus*—contracts concerning personalty, because the legal remedy as a rule is inadequate.

I. Contracts respecting personal chattels.

1. Contracts respecting personal chattels. Not generally enforced.

The general rule now is, not to entertain jurisdiction in equity for a specific performance or agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature.<sup>3</sup> But this rule is qualified and subject to cer-

<sup>1</sup> *Flight v. Bolland*, 4 Russ. 301.

<sup>2</sup> *Adderley v. Dixon*, 1 S. & S. 610. [*Phillips v. Berger*, 2 Barb. 608.]

<sup>3</sup> *Pooley v. Budd*, 14 Beav. 34. [*Mechanics Bk. v. Seton*, 1 Pet. 299.]

tain exceptions; or rather the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy.

Thus, in *Duncuft v. Albrecht*,<sup>1</sup> the Vice-Chancellor, in decreeing specific performance of an agreement for the sale of a certain number of shares in a railway company, said — “Now, I agree that it has long since been decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of three per cents., or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market.”<sup>2</sup> In *Buxton v. Lister*,<sup>3</sup> Lord Hardwicke puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him, by reason of its vicinity, and also the case of an owner of land covered with timber, contracting to sell his timber, in order to clear his land, and assumes that as, in both these cases, damages would not, by reason of the special circumstances, be a complete remedy, equity would decree a specific performance.<sup>4</sup>

Exceptions to general rule—  
(1.) Contract respecting shares in a railway company.

(2.) Contracts as to rare and beautiful articles.

Courts of equity will compel the specific delivery “of articles of unusual beauty, rarity, and distinction, so that damages would not be an adequate compensation for non-performance.”<sup>5</sup> *Dowling v.*

<sup>1</sup> 12 Sim. 199.

<sup>2</sup> *Doloret v. Rothschild*, 1 Sim. & Stu. 598; *Shaw v. Fisher*, 2 De G. & Sm. 11; *Odessa Tramways v. Mendel*, 8 Ch. Div. 235. [*Ferguson v. Paschall* 11 Mo. 267.]

<sup>3</sup> 3 Atk. 385.

<sup>4</sup> So of assigned debts under a bankruptcy. *Adderley v. Dixon*, 1 Sim. & Stu. 607.

<sup>5</sup> *Falcke v. Gray*, 4 Drew. 658.

*Betjemann*,<sup>1</sup> it was decided that the court has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But where, by the terms of the agreement and the frame of the pleadings, the plaintiff, seeking restitution of a picture, had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and that there was no jurisdiction in a court of equity to interfere.

(3.) Delivery up of heirlooms and other chattels of peculiar value.

It has been repeatedly decided, that it is within the jurisdiction of a court of equity to compel the specific delivery up of heirlooms or chattels of peculiar value to the owner, and on the same grounds as in cases of agreement, that the specific thing is the object, and damages will not afford an adequate compensation.<sup>2</sup> “Thus, the Pusey Horn, the patera of the Duke of Somerset, were things of such a character as a jury might (possibly) estimate by their weight; and this would obviously be a very inadequate and unsatisfactory measure of damages. In all cases, therefore, where the object of the suit is not open to compensation by damages, it would be strange if the law of this country did not afford any remedy; and great would be the injustice, if an individual cannot have his property without being liable to the estimate of people who cannot value it as he does.”<sup>3</sup>

(4) Specific performance where a fiduciary relation exists.

The cases which have been referred to are not the only class of cases in which the court will entertain a suit for delivery up of specific chattels. For,

<sup>1</sup> 2 J. & H. 544.

<sup>2</sup> *Somerset v. Cookson*, 1 Smith L. C. 891; *Pusey v. Pusey*, 1 Vern. 273.

<sup>3</sup> *Fells v. Read*, 3 Ves. 70; *Macclesfield v. Davis*, 3 V. & B. 16; *Reece v. Trye*, 1 De G. & Sm. 273; *Beresford v. Driver*, 14 Beav. 387; 16 Beav. 134. [See *McGowin v. Remington*, 2 Jones (Pa.) 56; *Summers v. Bean*, 13 Gratt. 404.]

where a fiduciary relation subsists between the parties, whether it be that of an agent or a trustee or a broker, or whether the subject-matter be stock or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of the power, and will compel a specific delivery up of the articles.<sup>1</sup>

## II. Contracts respecting land.

II. Contracts respecting land. Generally enforced, because damages at law no remedy.

It has been already suggested that courts of equity are in the habit of interposing to grant relief in cases of contracts respecting real property, to a far greater extent than in cases of contracts respecting personal property: not, indeed, upon the ground of any distinction founded upon the mere nature of the property, as real or as personal, but at the same time not wholly excluding the consideration of such distinction. In regard to contracts respecting personal property, if the contract is not specifically performed, the purchaser may in general provide himself with other goods of a like description and quality, with the damages given him at law, and thus completely obtain his object. But in contracts respecting a specific messuage or parcel of land, the same considerations do not in general apply. The locality, character, vicinage, soil, easements, or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser, so that it cannot be replaced by other land of the same precise value, but not having the same precise local conveniences or accommodations; and, therefore, a compensation in damages would not be adequate relief.<sup>2</sup> It would not attain the object desir-

<sup>1</sup> Wood v. Rowcliffe, 3 Hare 304; 2 Ph. 383; Pollard v. Clayton, 1 K. & J. 462; Edwards v. Clay, 29 Beav. 145. [Cowles v. Whitman, 10 Conn. 121.]

<sup>2</sup> Adderley v. Dixon, 1 Sim. & Stu. 607.

ed, and it would generally frustrate the plans of the purchaser. And hence it is that the jurisdiction of courts of equity to decree specific performance is, in cases of contracts respecting lands, universally maintained, whereas in cases respecting chattels it is limited to special circumstances. And the jurisdiction extends even to lands that are out of the jurisdiction, if the contract's parties are within it.<sup>1</sup>

Cases in which even the Statute of Frauds is broken in upon. (a.) If unconscientious to rely on it,—generally.

The Statute of Frauds says, that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged with it; and yet the court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it generally against conscience in the other party to insist on the want of writing so signed as a bar to the relief.<sup>2</sup> It is proposed to inquire, under what other more particular circumstances courts of equity hold that notwithstanding the express language of the statute, a case may be taken out of its opinion.

(b.) Where the agreement is confessed by the defendant's answer.

In the first place, then, courts of equity will enforce a specific performance of a contract within the statute, not in writing, where it is fully set forth in the bill, and is confessed by the answer of the defendant.<sup>3</sup> The reason given for this decision is, that the statute is designed to guard against fraud and perjury; and in such a case there can be no danger of that sort. The case, then, is entirely taken out of the mischief intended to be guarded against by the statute. Perhaps another reason might fairly be added, and that is that the agree-

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<sup>1</sup> In re Longdendale Cotton Spinning Co., 8 Ch. Div. 150; Penn. v. Lord Baltimore 2 Smith L. C. 837. [Massie v. Watts, 6 Cranch, 148.]

<sup>2</sup> Bond v. Hopkins, 1 S. & L. 433.

<sup>3</sup> Atty.-Gen v. Sitwell, 1 You. & Col. Exch. Ca. 559; Gunter v. Hasley, Amb. 586.



ment although originally by parol, is now in part evidenced by writing under the signature of the party, which is a complete compliance with the terms of the statute. If such an agreement were originally by parol but were afterwards reduced into writing by the parties, no one would doubt its obligatory force. Indeed, if the defendant does not insist on the defence, he may fairly be deemed to waive it; and the rule is, *Quisque renuntiare potest juri pro se introducto*.<sup>1</sup> It has been settled, however, that although the defendant by his answer confesses the parol agreement, he may insist by way of defence upon the protection of the statute, and such a defence is good.<sup>2</sup>

Unless the defendant, notwithstanding, insists upon the defence.

Secondly, courts of equity will enforce a specific performance of a contract within the statute where the parol agreement has been partly carried into execution by the party praying relief.<sup>3</sup> The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be able to practice a fraud upon the other; and it could never be the intention of the statute to enable any party to commit a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted instead of being obstructed by a jurisdiction for discovery and relief. And where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former

(c) Where the contract is partly performed by the party seeking aid.

<sup>1</sup> 1 Fonbl. Eq. B. 1. ch. 3, s. 8, note d. [Harris v. Knickerbacker, 5 Wend. 638.]

<sup>2</sup> Cooth v. Jackson, 9 Ves. 37; Blagden v. Bradbear, 12 Ves. 466, 471; Skinner v. M'Douall, 2 De G. & Sm. 265. [Robeson v. Hornbaker, 3 N. J. (Eq.) 60.]

<sup>3</sup> Caton v. Caton, L. R. 1 Ch. 137. [Miller v. Ball, 64 N. Y. 286.]

to suffer this refusal to work to his prejudice.<sup>1</sup>

Part-performance,  
—what is?

In order to withdraw a contract on the ground of part-performance from the operation of the statute, several circumstances must occur.

(1.) Acts of part-performance must be referable alone to the agreement alleged.

(1.) The acts of the part-performance must be such as are not only referable to an agreement such as that alleged, but such as are referable to no other title. For if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part-performance of the agreement.<sup>2</sup>

(2.) Introductory or ancillary acts are not acts of part-performance.

(2.) Also, acts merely introductory or ancillary to an agreement are not considered as part performance thereof, although they should be attended with expense. Therefore, delivering an abstract of title, giving directions for conveyance, going to view the estate, fixing upon an appraiser to value stock, making valuations, admeasuring the lands, registering conveyances, and acts of the like nature, are not sufficient to take a case out of the statute.<sup>3</sup> They are all preliminary proceedings, and for which damages for loss of time and labor would be an adequate compensation; and besides, they are of an equivocal character, and capable of a double interpretation; whereas acts to be deemed a part-performance should be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part-execution.<sup>4</sup>

Mere possession of the land not an act of part per-

Consequently, the mere possession of the land contracted for will not be deemed a part perform-

<sup>1</sup> Nicol v. Tackaberry, 10 Gr. 109; Hussey v. Horn Payne, 4 App. Ca. 311. [Wright v. Pucket, 22 Gratt. 374.]

<sup>2</sup> Gunter v. Halsey, Amb. 586; Lacon v. Mertins, 3 Atk. 4.

<sup>3</sup> Hawkins v. Holmes, 1 P. Wms. 770; Pembroke v. Thrope, 3 Swanst. 437; Whitchurch v. Bevis, 2 Bro. C. C. 559, 566.

<sup>4</sup> [Wright v. Pucket, 22 Gratt. 374.]

ance if it be wholly independent of the contract; therefore, where a tenant in possession sued for the specific performance of an alleged agreement for a lease, and set up his possession as an act of part-performance of the agreement, it was held not to be such, because it was referable otherwise than to the agreement, *i.e.*, to his character as tenant.<sup>1</sup> So again, where a tenant from year to year continues in possession, and lays out such moneys on the farm as are usual in the ordinary course of husbandry, this is no part-performance of an agreement for a lease.<sup>2</sup> But if the possession be delivered, and delivered and obtained *solely under the contract*; or if, in case of tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, *referable solely and exclusively to the contract*, there the possession may take the case out of the statute. Especially will it be held to do so where the party let into possession has expended money in building and repairs or other improvements; for under such circumstances, if the parol contract were to be deemed a nullity, the expenditure would not only operate to his prejudice, but be the direct result of the fraud practised upon him; and besides, he would be liable to be treated as a trespasser.<sup>3</sup>

(3.) The agreement which the acts of part-performance allow to be set up by parol evidence must be of such a nature that the court would have had jurisdiction in respect of it, in case it had been in writing. Where the court has jurisdiction in the

(3) The agreement must originally have been cognisable in a court of equity, independently of the acts of part-performance.

<sup>1</sup> Wills v. Stradling, 3 Ves. 378; Morphet v. Jones, 1 Swanst. 181.

<sup>2</sup> Brennan v. Bolton, 2 Dr. & War. 349.

<sup>3</sup> Lester v. Foxcroft, 1 Smith L. C. 828; Aylesford's Case, 2 Str. 783; Mundy v. Jolliffe, 5 My. & Cr. 167; Gregory v. Mighell, 10 Ves. 328; Pain v. Coombs, 1 De G. & J. 34, 46.

original subject matter viz., the contract, the want of writing will not deprive the court of it where there is part-performance. But the want of writing cannot itself be made the ground of jurisdiction; for then all parol contracts which the Statute of Frauds requires to be in writing might be enforced in equity when there was a part-performance.<sup>1</sup> And where the possession taken is not under a contract, but adverse, the circumstance that there is no legal remedy does not suffice to give the court jurisdiction.<sup>2</sup>

(4.) The acts done must not be capable of being undone, therefore payment of part or whole of purchase-money is not an act of part-performance, because re-payment will put the parties into the same position as before.

(4.) Payment of a part or even of the whole of the purchase-money is not an act of part-performance so as to take a contract out of the Statute of Frauds;<sup>3</sup> “for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in case of *Foxcroft v. Lester*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent.” Another reason alleged for the rule that “part-payment does not take the case out of the statute is, that the statute has said,<sup>4</sup> that in another case,” viz., with respect to goods, it shall operate as a part-performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred that when the legislature said it should bind in the case of goods, and were silent as to the case

29 Car. II., c. 3, sec. 17, provides for part-payment as to goods. *Expressio unius, exclusio alterius.*

<sup>1</sup> Fry on Spec. Performance, 179; *Kirk v. Bromley Union*, 2 Phil. 940.

<sup>2</sup> *East India Co. v. Veerasawmy Moodelly*, 7 Moo. P. C. C. 482.

<sup>3</sup> *Hughes v. Morris*, 2 De G. M. & G. 349.

<sup>4</sup> Sec. 17.

of lands, they meant that it should not bind in the case of lands.”<sup>1</sup>

(5.) Marriage alone is not a part-performance of a parol agreement in relation to it; for to hold this would be to overrule the Statute of Frauds, which enacts that every agreement in consideration of marriage, in order to be binding, must be in writing.<sup>2</sup> But a parol contract may be taken out of the statute by acts of part-performance independently of the marriage. Thus, in *Surcombe v. Pinniger*,<sup>3</sup> a father, previous to the marriage of his daughter, told her intended husband that he means to give certain leasehold property to them on their marriage. After the marriage *he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title-deeds. The husband also expended money upon the property.* It was held that there had been sufficient part-performance of the parol contract to take the case out of the Statute of Frauds. “In this case,” said Turner, L. J. “there is a part-performance by the delivering up of possession to the husband,—a fact which has always been held to change the situations and rights of the parties,—and there has been considerable expenditure by him on the property. There is, therefore, here what was wanting in *Lassence v. Tierney*—<sup>4</sup> acts of part-performance besides the marriage.”<sup>5</sup>

It would seem, also, that if there be “a written agreement after marriage, in pursuance of a parol

Written agree-  
ment after mar-  
riage.

<sup>1</sup> *Clinan v. Cooke*, 1 S. & L. 41; *Seagood v. Meale*, Prec. in Ch. 560.

<sup>2</sup> *Warden v. Jones*, 2 De G. & J. 76; *Caton v. Caton*, L. R. 1 Ch. 137; L. R. 2 Ho. of Lds. 127.

<sup>3</sup> 3 De G. M. & G. 571; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; 5 Ch. Div. 887.

<sup>4</sup> 1 Mac. & G. 551.

<sup>5</sup> *Warden v. Jones*, 2 De G. & J. 84.

agreement before marriage, this takes the case out of the statute;”<sup>1</sup> and the reason is this, that the object of the 4th sec. of the Statute of Frauds was not to alter principles of law, but modes of evidence. Its object was to prevent the mischief arising from resorting to oral evidence to prove the existence of the terms of an alleged verbal agreement in certain specified cases, and, amongst the rest, an agreement made in consideration of marriage. It is obvious that there can be no ground to apprehend any such mischief where you have a writing signed after marriage by the party to be charged, and referring clearly to the terms of an ante-nuptial agreement. It is therefore sufficient if there be a memorandum clearly containing the terms of the agreement before the action or suit arises.<sup>2</sup>

Representation upon the faith of which the marriage takes place.

And it may be further usefully mentioned here, with regard not only to parol marriage contracts, but to other parol contracts generally, that it is a very old head of equity, that “a representation made by one party, although by parol, for the purpose of influencing the conduct of the other party, and acted on by him, will be sufficient, although never subsequently evidenced by writing, to entitle him to the assistance of this court, for the purpose of realizing such representation;”<sup>3</sup> and it is a leading principle, repeatedly adopted in equity, that where, upon the marriage of two persons, a third party makes a representation upon the faith of which the marriage takes place, he shall be

<sup>1</sup> Turner, L. J., in *Surcombe v. Pinniger*, 3 De G. M. & G. 571; *Dundas v. Dutens*, 1 Ves. 196; *Barkworth v. Young*, 26 L. J. Ch. 157; *Peach on Marr. Sett.* 81; but see Lord Cranworth's remarks in *Warden v. Jones*, 2 De G. & J. 85; also *Trowell v. Shenton*, L. R. 8 Ch. Div. 318; *Dashwood v. Jenneyor*, 12 Ch. Div. 776.

<sup>2</sup> *Bailey v. Sweeting*, 30 L. J. C. P. 150; *Smith v. Hudson*, 6 N. R. 106.

<sup>3</sup> *Hammersley v. De Biel*, 12 Cl. & Fin. 62, 78.

bound to make his representation good.<sup>1</sup> It was upon this principle that an injunction was granted to restrain the enforcement of a demand, the party seeking to enforce it having, while a marriage treaty was pending, falsely represented to the father of the lady that there was no such demand existing. "If," said Lord Thurlow, "any man, upon a treaty for any contract, will make a false representation, by means of which he puts the person bargaining under a mistake upon the terms of the bargain, it is a fraud—it misleads the parties contracting on the subject of the contract . . . The principle upon which all the cases upon this subject have been decided is, that faith in such contracts is so essential to the happiness both of the parents and of the children, that whoever treats them fraudulently on such an occasion shall not only not gain, but shall even lose by it."<sup>2</sup>

But in these cases it is necessary that the plaintiff should base his action upon the ground of misrepresentation; for otherwise, if he bases it upon the ground of contract, he must make out a written contract or else sufficient part-performance. Thus, in *Caton v. Caton*,<sup>3</sup> previously to marriage, the intended husband and wife agreed in writing (but which writing was never signed by the husband,) that the husband should have the wife's property for his life, paying her £80 a year pin-money, and that she should have it after his death; and they gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they

Promise by husband to leave property by will not enforced,—where marriage is the consideration, and the promise is not in writing signed.

<sup>1</sup> *Bold v. Hutchinson*, 20 Beav. 256; 5 De G. M. & G. 558; *Walford v. Gray*, 13 W. R. 335; *Affd. Ib.* 761; *Goldicutt v. Townsend*, 28 Beav. 445; *Prole v. Soady*, 2 Giff. 1; and especially *Barkworth v. Young*, 26 L. J. Ch. 157.

<sup>2</sup> *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Montefiori v. Montefiori*; 1 Wm. Bl. 363.

<sup>3</sup> L. R. 1 Ch. 137; L. R. 2 Ho. of Lds. 127.

agreed that they would have no settlement, the husband promising, as the wife alleged, that he would make a will giving her all his property. The husband had previously to the marriage prepared a will, and immediately after the marriage the husband and wife went into the vestry, and he there executed the will. After his death, a subsequent and different will was found. It was held by the Lord Chancellor and the House of Lords (reversing the decision of Stuart, V.-C.) that the wife was not entitled to specific performance of the agreement by the husband to leave her his property by will.

(d.) Where agreement concerning land is not put into writing by fraud of one of the parties.

And now to resume the cases in which the Statute of Frauds will on various grounds be broken in upon—A contract regarding lands will be taken out of the operation of the statute, where the agreement is intended to be put into writing according to the statute, but that is prevented from being done by the fraud of one of the parties. In such a case courts of equity have said that the agreement shall be specifically executed, for otherwise the statute, designed to suppress fraud, would be the greatest protection to it. Thus, if an agreement in writing should be drawn up, and another should be fraudulently and secretly brought in, and executed in lieu of the former, in this and the like cases equity will relieve. So if a man should treat for a loan of money on mortgage, and the conveyance is to be by an absolute deed of the mortgagor and a defeasance by the mortgagee, and, after the absolute deed is executed, the mortgagee fraudulently refuses to execute the defeasance, equity will decree a specific performance.<sup>1</sup>

Representation of a mere intention, or a promise upon honor, not enforced.

Also, where the representation is not of an existing fact, but of a mere intention, or where a prom-

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<sup>1</sup> Maxwell v. Montacute, Prec. Ch. 526; Joynes v. Statham, 3 Atk. 389; Lincoln v. Wright, 4 De G. & J. 16.



isor will not bind himself by a contract, but gives the other party to understand that he must rely upon his honor for the fulfillment of his promise, in these cases, of course, the court will not enforce the performance of the representation or promise.<sup>1</sup>

It is now proposed to consider the principal defences that may be set up to a suit for specific performance, independently of the Statute of Frauds.

A misrepresentation, having relation to the contract, made by one of the parties to the other, is a ground for refusing the interference of the court at the instance of the party who has made the misrepresentation, and may in certain cases, be a ground for its active interference in setting aside the contract, at the instance of the party deceived.<sup>2</sup>

Mistake is also a ground for defence. The principle upon which courts of equity proceed in those cases where mistake is the ground of defence is this—that there must be an agreement binding at law; but this is not enough to entitle the plaintiff to more than his legal remedy—the contract must be more than merely legal. It must not be hard nor unconscionable; it must be free from fraud, from surprise, and from mistake; for where there is a mistake, there is not that consent which is essential to a contract in equity: *non videntur qui errant consentire*.<sup>3</sup>

The settled rule of the court is to admit parol evidence not merely for the purpose of proving a mistake by way not only of defence to a suit for specific

*Grounds of defence to a suit for specific performance.*

(1.) Misrepresentation by plaintiff having reference to the contract.

(2.) Mistake rendering specific performance a hardship.

Parol evidence of mistake is admitted notwithstanding the statute.

<sup>1</sup> Maunsell v. White, 1 Jo. & L. 539; 4 H. L. Cas. 1039; Jordan v. Money, 15 Beav. 372; 2 De G. M. & G. 318; 5 Ho. of Lds. Cas. 185.

<sup>2</sup> Edwards v. M'Leay, Coop. 308; Bascomb v. Beckwith, L. S. 8 Eq. 100; Talbot v. Hamilton, 34 Gr. 200; Fry on Spec. Perf. 191.

<sup>3</sup> Fry on Spec. Perf. 212. And see Jones v. Clifford, L. R. 3 Ch. Div.

fic performance, but for the purpose of correcting the mistake. This admission of such evidence is not a breach of the Statute of Frauds; because it should be remembered that the statute says, "No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement;" but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill has been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left as it was before the statute: it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind.<sup>1</sup>

The statute does not say a written agreement shall bind, but that an unwritten agreement shall not bind.

(3.) Error of defendant, although attributable to defendant's own negligence.

It follows from what has been stated, that where the defendant has been led into any error or mistake, the plaintiff cannot enforce the contract. Thus, in one case,<sup>2</sup> a professional man was relieved at his own suit from an error in a deed of his own drawing. On the same principle, in *Malins v. Freeman*,<sup>3</sup> where an estate was purchased at an auction, under a mistake as to the lot put up for sale, and the mistake arose wholly through the carelessness of the defendant, it was held that specific performance would not be enforced.

Effect of mistake, where parol variation is set up as a defence.

We may now proceed to consider the effect of a mistake, or parol variation, set up by the defendant as a ground for refusing the specific performance of a written agreement alleged by the plaintiff.<sup>4</sup>

<sup>1</sup> Clinan v. Cooke, 1 Sch. & Lef. 39.

<sup>2</sup> Ball v. Storie, 1 S. & S. 210.

<sup>3</sup> 2 Keen, 25, 34; and distinguish *Jeffreys v. Fairs*, L. R. Ch. Div. 448.

<sup>4</sup> See generally Fry on Spec. Perf. 216-236.

(a.) Where the parol variation set up by the defendant shows that after the parties to the contract had mutually agreed with each other, an error occurred *in the reduction of the agreement into writing*, and it appears that the written agreement, varied according to the defendant's contention, represents the true contract between the parties, the court will, it seems, where there has been no fraud, enforce specific performance of the contract so varied. Thus, where a bill was brought for the specific performance of an agreement to grant a lease at a rent of £9 per annum, and the defendant insisted that it ought to have been a term of the agreement that the plaintiff should pay all taxes, Lord Hardwicke granted specific performance, and directed that the terms of the verbal agreement should be carried out by the covenants to be inserted in the lease.<sup>1</sup>

(a.) Where the error arose in the reduction of the agreement into writing, specific performance decreed with parol variation set up by the defendant.

And the distinction is now apparently well established between the case of a plaintiff seeking, and a defendant resisting, specific performance. The rule is, that though a defendant, resisting specific performance, may go into parol evidence to show that, by fraud, accident, or mistake, the written agreement does not express the real terms, a plaintiff, with the exception hereafter noted, cannot do so for the purpose of obtaining specific performance with a variance.

Plaintiff cannot obtain specific performance with parol variation of written agreement.

Where, however, a plaintiff alleges a parol variation *in favor of the defendant*, and offers to perform the agreement with the variation, the court will enforce specific performance, though the defendant plead the statute. Thus, where the defendant agreed in writing to grant the plaintiff a lease at a specified rent and for specified term, and the plaintiff filed a bill for specific performance, stating the above agreement, and that it was further agreed that

Exception—unless the parol variation be in favor of the defendant.

<sup>1</sup> Joynes v. Statham, 3 Atk. 388.

he, the plaintiff, should pay a premium of £200, which, by his claim he offered to do; the defendant, acknowledging that the terms were such as the plaintiff represented them, insisted that, as the written agreement did not provide for those terms, the statute was a good defence. It was held, however, that this additional term did not render the statute a good defence, and Knight-Bruce, L. J., said—"Our opinion is, that when persons sign a written agreement upon a subject obnoxious, or not obnoxious, to the statute that has been so particularly referred to,<sup>1</sup> and there has been no circumvention, no fraud, nor (in the sense in which the term 'mistake' must be considered as used for the purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted in the documents; subject to this, that either of the parties sued in equity upon it may perhaps be entitled, in general, to ask the court to be neutral, unless the plaintiff will consent to the performance of the omitted term."<sup>2</sup> In such cases as these, the court interferes for the purpose of reforming the contract, and not rescinding it. "No doubt," says Lord Hardwicke,<sup>3</sup> "but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that, if reduced into writing contrary to intent of the parties, on proper proof, that would be rectified."

The defendant may ask the court to be neutral, unless the plaintiff will perform the omitted term

*Townshend v. Stangroom*,—as to difference between plaintiff seeking and defendant resisting specific performance.

The case of *Townshend v. Stangroom*,<sup>4</sup> affords a strong illustration of the above-mentioned distinction between the rights of a plaintiff and of a defendant setting up a parol variation to a written

<sup>1</sup> 29 Car. II. c. 3.

<sup>2</sup> *Martin v. Pycroft*, 2 De G. M. & G. 785; *Parker v. Taswell*, 2 De G. & Jo. 559.

<sup>3</sup> *Henkle v. Roy. Ex. Assoc. Co.*, 1 Ves. Sr. 317.

<sup>4</sup> 6 Ves. 328; *Smith v. Wheatcroft*, 9 Ch. Div. 223.

contract. There a lessor filed a bill for the specific performance of a written agreement for a lease, with a variation as to the quantity of land to be included in the lease, supported by parol evidence. The lessee filed a cross-bill for a specific performance of the written agreement without the parol variation. Lord Eldon dismissed both bills; the first because the parol evidence was not admissable on behalf of the lessor seeking specific performance; the second, because it was admissable when adduced by such lessor, as *defendant*, for the purpose of showing that by mistake or surprise the written agreement did not contain the terms intended to be introduced into it.<sup>1</sup>

[In the United States the English rule as illustrated in *Townshend v. Stangroom* has not been followed without much opposition. Chancellor Kent early laid it down that equity would enforce a written agreement with a parol variation at the suit of a party to it.<sup>2</sup> This ruling has been followed in a number of cases,<sup>3</sup> while in others the English rule has been adhered to.<sup>4</sup>]

But where the mistake or parol variation set up by the defendant does not show a mere mistake in the reduction of the contract into writing, but that one party understood one thing, and the other another, there is no contract at all in such a case, for want of the *assensus ad idem*, and the plaintiff's bill is consequently dismissed.<sup>5</sup>

(b.) Where the parol variation, which the plaintiff or defendant seeks to set up, is a subsequent agreement in parol between the parties to a written agreement, the case in nowise comes within the doctrine of mistake,

*Secus*—where a misunderstanding as to terms of agreement.

(b.) Where the parol variation is subsequent to the contract.

<sup>1</sup> Wollam v. Hearn, 2 Smith L. C. 468.

<sup>2</sup> [Gillespie v. Moon, 2 Johns. Ch. 585.]

<sup>3</sup> [See Bradford v. Union, Bh. 13 How. 57.]

<sup>4</sup> [See Osborn v. Phillips 19 Conn. 63; Glass v. Hulbert, 102 Mass. 24.]

<sup>5</sup> Legal v. Miller, 2 Ves. Sr. 299.

and the parol variation is inadmissible under the Statute of Frauds, except in cases where the refusal to perform it might amount to fraud;<sup>1</sup> or unless there have been such acts of part-performance as would justify a decree in the case of an original substantive agreement.<sup>2</sup>

(4.) Misdescription,—according as it is substantial or not.

Another common ground of defence to an action for specific performance is, that, by a misdescription of the property, the defendant has purchased what he never intended to purchase. Under this defence, two classes of cases arise:—

1. Cases where the misdescription is of a substantial character, and will not, in justice admit of compensation.

2. Cases where the misdescription is of such a character as fairly to admit of compensation.

Where the misdescription is of a substantial character, it is a good defence.

In cases of substantial misdescription. The principle governing this class of cases is thus summed up by Lord Eldon;<sup>3</sup>—"The court is, from time to time, approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take at all that which he did not mean to have."

Whether misdescription is substantial is a matter of evidence.

The question whether a misdescription is a substantial one or not, is one concerning which no general rule can be laid down. Each case will be decided on its own particular facts.

(A.) Purchaser not compelled to take,—  
(a.) Freehold instead of copyhold.

(A.) Cases where vendor seeks specific performance.

Where property sold as copyhold turned out to be partly freehold, it was held that the vendor could not compel specific performance, notwithstanding a

<sup>1</sup> See observations of Sir W. Grant in *Price v. Dyer*, 17 Ves. 364.

<sup>2</sup> *Legal v. Miller*, 2 Ves. Sr. 299; *Van v. Corpe*, 3 My. & K. 269, 277.

<sup>3</sup> *Knatchbull v. Grueber*, 3 Mer. 146; and see *Jaques v. Miller* L. R. 6 Ch. Div. 153.

special condition providing that errors in the description should not invalidate the sale. It was insisted for the vendor that freehold was better than copyhold, but the Master of the Rolls said:—"It is impossible to enter into a consideration of the different motives which may induce a person to prefer property of one tenure to another. *The motives and fancies of mankind are infinite*, and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another."<sup>1</sup>

So a purchaser is not compelled to take an underlease instead of an original lease.<sup>2</sup> So again where a wharf and jetty were contracted to be sold, and it turned out that the jetty was liable to be removed by the Corporation of London, specific performance was refused.<sup>3</sup> In the case of the sale of a residence and four acres of land, it having turned out that there was no title to a slip of ground of about a quarter of an acre between the house and the highroad, the Master of the Rolls said:—"Under ordinary circumstances, this would be a case for compensation; but here is a house, with a long strip of land between it and the road, to which there is no title, so that the people in passing can look in at the window. This is not a case for compensation."<sup>4</sup>

Where, however, in the eye of the court the difference is not material, and is such that it is a proper subject for compensation, the court will enforce the contract, at the suit of the vendor, compelling him to make compensation to the purchaser. For example, where there was an objection to the title of

(b.) Underlease instead of original lease.

Where the difference is slight, and a proper subject for compensation, it will be enforced with compensation, as where acreage is deficient.

<sup>1</sup> Ayles v. Cox, 16 Beav. 23; Drewe v. Corp, 9 Ves. 368; Wright v. Howard, 1 S. & S. 190; Hart v. Swaine, L. R. 7 Ch. Div. 42.

<sup>2</sup> Madeley v. Booth, 2 De G. & Sm. 718.

<sup>3</sup> Peers v. Lambert, 7 Beav. 546.

<sup>4</sup> Perkins v. Ede, 16, Beav. 193; Knatchbull v. Grueber, 3 Mer. 124.

six acres out of a large estate, and these did not appear material to the enjoyment of the rest,<sup>1</sup> specific performance was nevertheless decreed. So again, where fourteen acres were sold as water-meadow, and twelve only answered that description, it was held a fit subject for compensation.<sup>2</sup> And, *nota bene*, that after conveyance of the estate, there can be no claim made for compensation.<sup>3</sup>

No compensation where there has been fraud.

Nor where the compensation cannot be estimated.

The principle of granting compensation in lieu of rescinding the contract, in case of any error or misstatement, will never be applied where there has been fraud or misrepresentation.<sup>4</sup> It is also a necessary principle that, where there are no data from which the amount of compensation can be ascertained, the court cannot enforce the contract with compensation. But this objection is one which the courts are unwilling to entertain.<sup>5</sup>

(B.) Purchaser can compel specific performance, and may at the same time insist on an abatement.

(B.) Where purchaser seeks specific performance.

The law is thus laid down by Sir William Grant in *Hill v. Buckley*:<sup>6</sup>—"Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation." "If," observes Lord Eldon, "a man, having partial interests in an estate, chooses to enter into a contract representing it, and

<sup>1</sup> *M'Queen v. Farquhar*, 11 Ves. 467; *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609.

<sup>2</sup> *Scott v. Hanson*, 1 R. & My. 128.

<sup>3</sup> *Manson v. Thacker*, 7 Ch. Div. 620; *Besley v. Besley*, 9 Ch. Div. 103. But see *In re Turner and Skelton*, W. N. 151.

<sup>4</sup> *Clermont v. Tasburgh*, 1 J. & W. 120; *Price v. Macaulay*, 2 De G. M. & G. 339, 344. But see *Powell v. Elliott* L. R. 10 Ch. App. 424.

<sup>5</sup> *Ramsden v. Hirst*, 4 Jur. N. S. 200; *Brooke v. Rounthwaite*, 5 Hare, 298; *Powell v. Elliott*, *supra*.

<sup>6</sup> 17 Ves. 401; *Horrock v. Rigby*, 9 Ch. Div. 180; but see *Durham v. Legard*, 34 L. J. Ch. 589.



agreeing to sell the estate, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the court will not hear the objection of the vendor, that the purchaser cannot have the whole."<sup>1</sup>

Vendor must sell what interest he has, if purchaser elect.

Courts of equity will not, however, at the suit of a purchaser, compel a partial performance of a contract which is unreasonable or prejudicial to third parties interested in the property,<sup>2</sup> nor where the deficiency as to the extent or duration of an interest contracted to be sold does not admit of compensation.<sup>3</sup>

Partial performance not compelled, where unreasonable or prejudicial to third parties.

The objection that a plaintiff has not performed his part of the contract at the time specified, may furnish grounds of defence to suits for specific performance. At law, the plaintiff must show that all those things which are on his part to be performed, have been performed within a reasonable time, or, where time is specified by the contract, within the time so specified. At law, time used to be always of the essence of the contract;<sup>4</sup> but in equity, the question of time was differently regarded; for a

(5.) Lapse of time.

At law, time always of the essence of the contract.

Equity is guided by the nature of the case as to time.

<sup>1</sup> *Mortlock v. Buller*, 10 Ves 315; *Wilson v. Williams*, 3 Jur. N. S. 810; *Seaman v. Vawdrey*, 16 Ves, 390; *Painter v. Newby*, 11 Hare, 26; *Barker v. Cox*, L. R. 4 Ch. Div. 464; *McKenzie v. Hesketh*, L. R. 7 Ch. Div. 675. [*Stockton v. Union Oil Co.* 4 W. Va. 273.]

<sup>2</sup> *Thomas v. Dering*, 1 Keen, 729; *Beeston v. Stutley*, 6 W. R. 206.

<sup>3</sup> *Balmanno v. Lumley*, 1 V. & B. 225; *Ridgway v. Gray*, 1 Mac. & G. 109.

<sup>4</sup> *Stowell v. Robinson*, 3 Bing. N. C. 928.

court of equity discriminated between those terms of a contract which were formal, and a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which were of the substance and essence of the agreement;<sup>1</sup> and applying to contracts those principles which had governed its interference in relation to mortgages,<sup>2</sup> it had held time to be *prima facie* non-essential, and had accordingly granted specific performance of agreements after the time for their performance had been suffered to pass, by the party asking for the intervention of the court, if the other party had not shown a determination to proceed. There were, however, certain cases where lapse of time was a bar to relief even in equity. Thus—

When lapse of time is a bar in equity.

(a.) Where time was originally of the essence of the contract.

(a.) Those cases where time was originally of the essence of the contract; and this whether made so by the express agreement of the parties,<sup>3</sup> or from the nature of the subject-matter, with which the parties were dealing, as in the case of reversionary interests.<sup>4</sup>

(b.) Where time was made of the essence of the contract by subsequent notice.

(b.) Those cases where, though time was not originally of the essence of the contract, it was engrafted upon it by subsequent notice.<sup>5</sup>

(c.) Where lapse of time was evidence of laches or abandonment.

(c.) Cases where the delay had been so great as to constitute laches, disentitling the party to the aid of the court, and evidencing an abandonment of the contract irrespectively of any peculiar stipulations as to time.<sup>6</sup>

<sup>1</sup> Parkin v. Thorold, 16 Beav. 59.

<sup>2</sup> Per Lord Eldon in Seton v. Slade, 7 Ves. 273.

<sup>3</sup> Hudson v. Bartram, 3 Mad. 440; Honeyman v. Marryat, 21 Beav. 14, 24.

<sup>4</sup> Hipwell v. Knight, 1 Y. & C. Exch. Ca. 416; Withy v. Cottle, T. & R. 78; Walker v. Jeffreys, 1 Hare, 341.

<sup>5</sup> Taylor v. Brown, 2 Beav. 180; Benson v. Lamb, 9 Beav. 502; Macbryde v. Weekes, 22 Beav. 533.

<sup>6</sup> Moore v. Blake, 2 Ball. & B. 62; Milward v. Thanet, 5 Ves. 720 n; Eads v. Williams, 4 De G. M. & G. 591; Mills v. Haygood, L. R. 6 Ch. Div. 196.

It has already been pointed out, the courts of equity will never countenance fraud, and that where there is reason to believe that a contract is tainted with fraud, the court will refuse relief unless the party seeking its aid comes with clean hands, and has a conscientious title to relief.<sup>1</sup> If, therefore, there has been actual misrepresentation,<sup>2</sup> or fraudulent suppression of the truth,<sup>3</sup> equity will refuse to enforce specific performance; and the defrauded person may even rescind the contract.<sup>4</sup>

Although, as a general rule of equity, inadequacy of consideration, except in cases of sales of reversionary interests,<sup>5</sup> and except where fraud or imposition is presumed, is not a ground for refusing specific performance;<sup>6</sup> still as the aid by equity in such cases is discretionary, a contract which would work a great hardship will not be enforced, but the plaintiff will be left to his remedy at law.<sup>7</sup>

So again, as we have already seen, specific performance of an agreement to perform an unlawful act,<sup>8</sup> or which would involve a breach of trust, will not be enforced.<sup>9</sup>

Also, if the alleged contract is no contract, that is, if it is not a complete contract as such, but is in-

(6.) The plaintiff has not "clean hands."

(7.) Great hardship in the contract.

(8.) The contract involves the doing of an unlawful act or breach of trust.

(9.) The contract is not established

<sup>1</sup> Harnett v. Yielding, 2 S. & L. 554; Reynell v. Spyre, 1 De G. M. & G. 660.

<sup>2</sup> Brooke v. Rounthwaite, 5 Hare, 298; Higgins v. Samels, 2 J. & H. 460; Farebrother v. Gibson, 1 De G. & J. 602.

<sup>3</sup> Drysdale v. Mace, 5. De G. M. & G. 103; Shirley v. Stratton, 1 Bro. C. C. 440.

<sup>4</sup> In re Bannister, W. N. 1879, p. 64.

<sup>5</sup> Playford v. Playford, 4 Hare, 546; and see supra, p. 476.

<sup>6</sup> Sullivan v. Jacob, 1 Moll. 477.

<sup>7</sup> Wedgwood v. Adams, 6 Beav. 600, 8 Beav. 103; Watson v. Marston, 4 De G. M. & G. 230, 239; Tildesley v. Clarkson, 30 Beav. 419; Peacock v. Penson, 11 Beav. 355.

<sup>8</sup> Howe v. Hunt, 31 Beav. 420; Harnett v. Yielding, 2 Sch. & Lef. 554.

<sup>9</sup> Mortlock v. Buller, 10 Ves. 292; Rede v. Oakes, 13 W. R. 303; Sneesby v. Thorne, 7 De G. M. & G. 399.

complete as a contract simply, whether because of some condition precedent not having been performed or from any other cause whatever, the court will not enforce specific performance of it, because that would first be to make the contract.<sup>1</sup> But a mere uncertainty in the amount of the land agreed to be sold, if that uncertainty is removable upon an inquiry, will not bar the right to specific performance.<sup>2</sup>

(10.) The contract is already executed.

And finally, if the contract is no longer executory, but is executed by possession delivered or otherwise, then (in the absence of other equities) the court, *semble*, will not enforce it, because it is, of course, enforced already;<sup>3</sup> *secus*, if there is an equity to enforce the contract.<sup>4</sup>

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<sup>1</sup> *Rossiter v. Miller*, L. R. 5 Ch. Div. 648; on App. 3 App. Ca. 1114; *Williams v. Jordan*, L. R. 6 Ch. Div. 517; *Winn v. Bull*, L. R. 7 Ch. Div. 29; *Hudson v. Buck*, L. R. 7 Ch. Div. 683. But distinguish *Bonnewell v. Jenkins*, 8 Ch. Div. 70.

<sup>2</sup> *Chattock v. Muller*, 8 Ch. Div. 177.

<sup>3</sup> *Tress v. Savage*, 4 Ell. & Black. 36; *Haigh v. Jaggard*, 16 Mee. & Wel. 525; 2 Coll. Ch. Ca. 231.

<sup>4</sup> *Parker v. Taswell*, 2 De Gex. & J. 559.

## CHAPTER X.

## INJUNCTION.

An injunction is a writ remedial, issuing by order of a court of equity, and now also by order of a court of law, in cases where the plaintiff is entitled to equitable relief; and its general purpose is to restrain the commission or continuance of some act of the party enjoined.<sup>1</sup> Definition.

The object of the writ or order is generally preventive and protective rather than restorative, although it may also be restorative. It seeks to prevent a meditated wrong more than to redress an injury already done. It is not confined to cases falling within the exercises of the concurrent jurisdiction of the court; but it equally applies to cases belonging to its exclusive jurisdiction. It is treated of, however, in this place principally because it forms a broad foundation for the exercise of the concurrent jurisdiction in equity. Its object is preventive rather than restorative.

The writ of injunction was and still is peculiarly an instrument of the court of Chancery though there were some cases where courts of law were accustomed to exercise analogous powers, as by the writ Jurisdiction of equity arose from want of adequate remedy at law.

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<sup>1</sup> Joyce on Injunctions, 1.

of prohibition and estrepement in cases of waste.<sup>1</sup> The cases, however, to which these common law processes were applicable, were so few, and the processes themselves were so utterly inadequate for the purposes of justice, that the jurisdiction at law fell practically into disuse, and almost all the remedial justice of this sort came to be administered through the instrumentality of courts of equity. The jurisdiction of these courts, then, had its true origin in the fact that there was either no remedy at all at law, or the remedy at law was imperfect and inadequate.

The cases in which courts of equity interfered by way of injunction were usually classed under two heads:—

Two classes of injunctions,—

I. Injunctions to prevent the inequitable institution or continuance of judicial proceedings; and,

II. Injunctions to restrain wrongful acts unconnected with judicial proceedings.

Premising thus much, we propose to state, firstly, the cases in which formerly an injunction would have issued, but now only a stay of proceedings; and, secondly, the cases in which an injunction properly so called may issue.

I. Orders to stay proceedings,—cases for.

I. Injunctions to restrain judicial proceedings, and now merely orders to stay the proceedings.

The old injunction in equity did not interfere with the jurisdiction of the common law courts.

At first sight it might have seemed that a court of equity in granting an injunction against a proceeding in a court of common law, detracted from the dignity of that court and interfered with its process; and until the reign of James I., the Common Law Judges as strenuously resisted this exercise of equitable jurisdiction as the Chancellors asserted it.<sup>2</sup> But there was no just foundation for the opposition of the courts of common law to equitable jurisdiction. A writ of injunction was in no real sense a prohibi-

<sup>1</sup> *Jefferson v. Bishop of Durham*, 1 Bos. & P. 105, 120-132.

<sup>2</sup> *Hallam's Const. Hist.* vol. i. p. 472.

tion to those courts in the exercise of their jurisdiction. It was not addressed to those courts. It did not even affect to interfere with them. The process, when its object was to restrain proceedings at law, was directed *only to the parties*. It neither assumed any superiority over the court in which those proceedings were had, nor denied its jurisdiction. It was granted on the sole ground, that from certain equitable circumstances, of which the court of equity granting the process had cognizance, it was against conscience that the party inhibited should proceed in the cause. Equity, in short, acted *in personam*. In all cases, therefore, where by accident, mistake or fraud, or otherwise, a party had an unfair advantage in proceedings in a court of law, which must necessarily have made that court an instrument of injustice, and it was therefore against conscience that he should use that advantage, a court of Equity would restrain him from using that advantage which he had thus improperly gained.<sup>1</sup>

Equity acted *in personam* on the conscience of the person enjoined.

Upon the same principle, although the courts of one country had no authority to stay proceedings in the courts of another, they had an undoubted authority to control all persons and things within their own territorial limits. Where, therefore, both parties to a suit in a foreign country were resident within the jurisdiction of the court of equity, it would restrain either party from proceeding in a suit out of its jurisdiction. They did not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they considered the equities between the parties, and decreed *in personam* according to those equities, and enforced obedience to their decrees by process *in*

Courts of equity might restrain proceedings in a foreign court, if the parties were within their jurisdiction, and they may still do so.

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<sup>1</sup> [Ferguson v. Fisk, 28 Conn. 501.]

*personam*.<sup>2</sup> And, *semble*, any division of the court may now do the like in a proper case.

Equity granted relief where the remedy at law would be complete if proofs could be had; and also in cases of purely equitable rights.

It would be difficult to enumerate all the cases where courts of equity would grant an injunction, whether generally or to stay proceedings at law. They afforded this relief not only where the defendant would have a complete remedy at law if he were in possession of the appropriate proofs, but also where the rights of the parties were wholly equitable in their nature, or incapable, under the circumstances, of being asserted in a court of law. A brief enumeration of some of the cases in which a court of equity granted this mode of relief will best illustrate the scope of its jurisdiction, and will also show the cases in which at the present day a stay of proceedings in the action would be directed.

(1.) Equity restrained proceedings on an instrument obtained by fraud or undue influence; and now a stay of proceedings may be directed in such a case.

Where an instrument had been obtained by fraud or undue influence, the court of equity would restrain proceedings at law on it. Thus, where a young man, an officer in the army, soon after coming of age, became liable upon bills of exchange, for the accommodation of his superior officer, to the defendant, a money-lender by profession; and upon negotiations for getting in the bills, the defendant agreed to postpone them for twelve months, and induced the plaintiff, upon representations of his trouble and expense in procuring the postponement of the bills, to give him, in consideration of such trouble and expense, a further promissory note; the court not finding in the answer a satisfactory explanation of these transactions, sustained an injunction against the defendant proceeding at law upon his securities.<sup>2</sup> In the like case, the court of law

<sup>1</sup> *Portarlington v. Soulby*, 3 My and K. 106; *Hope v. Carnegie*, L. R. 1 Ch. 230; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416-437.

<sup>2</sup> *Lloyd v. Clark*, 6 Beav. 309; *Tyler v. Yates*, L. R. 11 Eq 265.



would direct a stay of proceedings in the action and might even dismiss the action altogether, or direct a verdict for the defendant.

Suppose, again, an executor or administrator should be in possession of abundant assets to pay all the debts of the deceased, and by an accidental fire, or by a robbery, without any default on his part, a great portion of them should be destroyed, so that the estate should be deeply insolvent; in such a case he might have been sued by a creditor at law, and he would have had no defence; for when he once became chargeable with the assets at law, he was for ever chargeable, notwithstanding any intervening casualties. But courts of equity would restrain proceedings at law in cases of this sort, upon the purest principles of justice;<sup>1</sup> and now the courts of common law would stay the proceedings, or even direct a verdict for the defendant.<sup>2</sup>

So again, where a party had only an equitable title, a plaintiff at law, having only a legal title, would be restrained from pursuing that title in a court of common law. Thus in *Newlands v. Paynter*,<sup>3</sup> personal chattels were bequeathed to a single woman for her separate use, but without the intervention of trustees, so that the property legally belonged to (*i. e.*, the legal estate was in) her husband upon her subsequent marriage with him; and after the marriage this property was taken in execution for the debt of her husband, who at law was (as was already stated) the legal owner; it was held, however, that the husband was a trustee for his wife, and an injunction was issued to restrain the sale under the writ.<sup>4</sup> And now

<sup>1</sup> *Crosse v. Smith*, 7 East. 258; *Croft v. Lyndsey*, Freem. Ch. 1.

<sup>2</sup> And see *Job v. Job*, 26 W. R. 206; L. R. 6 Ch. Div. 562; *Mayer v. Murray*, 8 Ch. Div. 424.

<sup>3</sup> 4 My. & Cr. 408. [*Trenton v. McKelway*, 4 Halst. Ch. 84.]

<sup>4</sup> *Langton v. Horton*, 3 Beav. 464; *Pyke v. Northwood*, 1 Beav. 152.

(2.) Where assets had been lost by an executor or administrator without his default, equity restrained proceedings at law by creditors; and now a stay of proceedings may be directed in such a case.

(3.) A party who had only an equitable title protected against one who had a bare legal title.

a court of law would itself restrain or stay the execution against the wife's property.

(4.) Injunction on a creditor's action for administration.

Another class of cases in which injunctions were granted against proceedings at law, was where there had already been a decree upon a creditor's bill for the administration of assets. Such a decree was considered in equity to be in the nature of a judgment for all the creditors; and, therefore, if subsequently to it a bond creditor should sue at law, the court of equity in which the decree was made, would, in the assertion of its jurisdiction, restrain him from proceeding in his suit.<sup>1</sup> And now the court of law would stay the action, and probably direct it to be transferred to the Chancery Division.<sup>2</sup>

(5.) A party can not bring several suits for one and the same purpose.

A party would not be permitted to sue for the same thing and the same purpose, in equity as well as in another court, but would be put to his election to sue in one or the other.<sup>3</sup> The only exception to this general rule was the case of a mortgagee, who might pursue all his remedies, whether at law or in equity;<sup>4</sup> but in all cases, even in the exceptional case of a mortgagee, the actions would probably *now* be brought on together in some manner or other.

(6.) Equity protected its own officers who executed the processes of the court.

Courts of equity would grant an injunction to protect their own officers, who executed their processes, against any suits brought against them for acts done under or in virtue of such processes. The ground of this assertion of the jurisdiction was, that courts of equity would not suffer their processes to be examined by any other courts. If the processes were irregular, it was the duty of the courts of equity

<sup>1</sup> *Morrice v. Bank of England*, Cas. t. Talb. 217; *Perry v. Phelps*, 10 Ves. 38, 39; *Burles v. Popplewell*, 10 Sim. 383.

<sup>2</sup> *Disting. Crowle v. Russell*, 4 C. P. Div. 186.

<sup>3</sup> *Vaughan v. Welsh*, Mos. 210; *Gedge v. Montrose*, 5 W. R. 537.

<sup>4</sup> See *Palmer v. Hendrie*, 27 Beav. 349; *Schoole v. Sall*, 1 S. & L. 176.

themselves to apply the proper remedy.<sup>1</sup> And courts of law would always do the like.

There were, however, cases in which courts of equity would not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they would not interfere to stay proceedings in any criminal matters, or in cases not strictly of a civil nature; as, for instance, on an indictment, or a mandamus, or a criminal information. But this restriction applied, of course, only to cases where the parties seeking redress by such proceedings were not also the plaintiffs in equity, for if they were, the court possessed power to restrain them personally from proceeding at the same time upon the same matter of right in both a civil suit and a criminal prosecution.<sup>2</sup> Regarding actions of libel, the court of equity would not usually restrain them; they were, in fact, actions exclusively appropriate to the courts of common law where a jury could be had.<sup>3</sup>

A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law where the case in equity rested upon a ground equally available at law and in equity, unless the plaintiff could establish some special equitable ground for relief.<sup>4</sup>

It was no ground for equitable interference that a party has not effectually availed himself of a defence at law, or that a court of law has erroneously decided a point of pure law.<sup>5</sup>

<sup>1</sup> *May v. Hook*, cited 2 Dick. 619; *Walker v. Micklethwait*, 1 Dr. & Sm. 49; *Re James Campbell*, 3 De G. M. & G. 585.

<sup>2</sup> *Holderstaffe v. Saunders*, 6 Mod. 16; *Montague v. Dudman*, 2 Ves. Sr. 396; *Mayor of York v. Pilkington*, 2 Atk. 302; *Story* 893.

<sup>3</sup> *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. App. 142. But see *Thorley's Cattle Food Co. v. Massam*, L. R. 6 Ch. Div. 582; and *Hinrichs v. Berndes*, W. N. 1878, p. 11.

<sup>4</sup> *Harrison v. Nettleship*, 2 My. & K. 423.

<sup>5</sup> *Simpson v. Howden*, 3 My. & Cr. 108; *Protheroe v. Forman*, 2 Swanst. 227, 233; *Ware v. Horwood*, 14 Ves. 31.

In what cases equity would not stay proceedings at law. — (1.) In criminal matters, or in matters not purely civil.

(2.) Where the ground of defence was equally available at law, and had not been taken or maintained there.

Of course, in all such cases, the proper course is to appeal.

II. Injunctions against wrongful acts of special nature.  
Two classes.

II. Injunctions to restrain wrongful acts unconnected with judicial proceedings.

The equitable jurisdiction under this head may be divided into two classes.

1. Injunctions to enforce a contract (express or implied) or to forbid a breach thereof.

2. Injunctions to prevent a tort, that is, a wrong independent of contract.

1. Injunction in cases of contract.

I. With reference to injunctions to enforce a contract, or to forbid a violation of its terms, the jurisdiction of equity may be said to be co-extensive with its power to compel a specific performance.

Supplemental to the jurisdiction to compel specific performance.

Whatever duty a court of equity will compel a party to perform, it will generally, on the other hand, restrain him from neglecting to perform.<sup>1</sup> And in many cases, where, from the nature of the subject-matter, the court does not decree specific performance, on the ground of its inability to carry such a decree into effect, it will grant an injunction to restrain the doing of an act contrary to the tenor of the contract; and in effect, though indirectly, it compels thereby a specific performance of the contract. Thus in the case of *Catt v. Tourle*,<sup>2</sup> the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted that he should have the exclusive right of supplying beer to any public-house erected on the land so sold. The defendant, a member of the society, who was also a brewer, acquired a portion of the land, *with notice of the covenant*, and erected on it a public-house, which he supplied with his own beer. On a bill filed to restrain the defendant from supplying beer, the court held that the covenant, though in

<sup>1</sup> Drew on Injunctions, 250.

<sup>2</sup> L. R. 4 Ch. 654. [*Stewart v. Winters*, 4 Sandf. Ch. 587.]

terms positive, was in substance negative, and granted an injunction accordingly.

It is evident that where a contract is not to do a thing, which contract is capable of being enforced in equity, it may be, and naturally is, enforced by the court by means of an injunction restraining the doing of that act.<sup>1</sup> Therefore, where an agreement was entered into between the plaintiffs (who resided very near the church of Hammersmith) of the one part, and the parson, churchwardens, overseers, and certain inhabitants of the parish of the other part, by which the plaintiffs covenanted to erect a new cupola, clock, and bell to the church; and the parties of the second part covenanted that a bell which had been daily rung at five o'clock in the morning, to the great annoyance of the plaintiffs, should not be rung during the lives of the plaintiffs, or the survivors of them; the plaintiffs performed their part of the agreement, but the bell, after two years, was rung again; the agreement was specifically enforced against the parish authorities by means of an injunction against ringing the bell in breach of the agreement.<sup>2</sup>

Injunction a mode of specific performance of negative agreements.

It seems to be now settled that the inability of equity to compel the specific performance of one part of an agreement, is not *per se* a ground for its refusing to enjoin against the breach of another part of the same agreement. Thus, in *Lumley v. Wagner*,<sup>3</sup> J. W. agreed with W. L. that she would sing at B. L.'s theatre during a certain period of time, and would not sing elsewhere without his written authority. The court granted an injunction

Court of equity may restrain the breach of part of an agreement, though it cannot compel specific performance of the rest.

<sup>1</sup> *Lumley v. Wagner*, 1 De G. M. & G. 615.

<sup>2</sup> *Martin v. Nutkin*, 2 P. Wms. 266; *Barret v. Blagrove*, 5 Ves. 555; S. C. 6 Ves. 104; *Fry on Spec. Perf.* 329; *Broder v. Salliard*, L. R. 2 Ch. Div. 692; *Richards v. Revitt*, L. R. 7 Ch. Div. 224.

<sup>3</sup> 1 De G. M. & G. 616.

against J. W. singing at a rival theatre. The Lord Chancellor said:—"The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff, and the other by the defendant, . . . but of an act to be done by J. W. alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant, the one being ancillary to, concurrent and operating together with, the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract; it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant, J. W., from any other theatre, while the court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court; and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce."<sup>1</sup>

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<sup>1</sup> *Montague v. Flockton*, L. R. 16 Eq. 189. But see *Wolverhampton Railway v. London and Northwestern Railway*, L. R. 16 Eq. 440; *Fothergill v. Rowland*, L. R. 17 Eq. 141.

But where the terms of a contract are such that the court cannot superintend so as to secure the performance by a plaintiff on his part, it will not decree specific performance; and if, on non-performance by a plaintiff, both parties cannot have equal justice, it will not, in the absence of an express negative covenant, and where the contract cannot be split into two separate and independent portions, and the negative part enforced, grant an injunction to restrain acts, the doing of which is inconsistent with the maintenance of the contract.<sup>1</sup>

No specific performance where court cannot secure performance by the plaintiff.

It is not only in the case of express contracts of the kinds above illustrated that equity interposes by injunction to restrain conduct contrary to their tenor, but also in implied contracts resulting from the acts or representations of the parties.

Injunction, although the contract is implied only.

Thus, it is a very old head of equity jurisdiction, that if a person makes a representation to another as an inducement to him to act, and he thereupon acts upon the faith of that representation, the former shall make it good. A, the lessee of a building lease, in which there was a covenant to erect houses on three plots of land in a specified manner, sold one of the houses to B., the plaintiff's predecessor in title, to whom he represented that he was restricted from building, so as to obstruct the sea view. A., in the sub-lease granted to B., covenanted to observe the lessee's covenants in the original lease, but subsequently surrendered the old lease to his lessor, and a new lease without the restrictive covenant was granted to him in lieu thereof; and A. commenced building, contrary to the original covenant. Upon a bill filed by the

If a representation is made inducing another to do an act, equity restrains the contrary.

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<sup>1</sup> Joyce on Injunctions, 204; *Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Company*, 11 W. R. 874.

plaintiff, it was held that he was entitled to an injunction.<sup>1</sup>

A party claiming a title in himself, and standing by while another deals with the property as his own, restrained.

It has upon similar principles been held that where a person claiming a title in himself is privy to the fact that another party is dealing with the property as his own, he will be restrained from asserting his own title against a title created by such other person, although he derives no benefit from the transaction.<sup>2</sup> And the same doctrine is applicable where a person having a title to an estate stands by and suffers a person ignorant of it to expend money upon the estate. In such cases, the person who has so expended money will, in equity, be indemnified for his expenditure on eviction, by the real owner, for it would be inequitable for him to profit by his own fraud.<sup>3</sup>

## 2. Injunctions against torts.

Wherever there is a right, there is a remedy for its breach, if the right be cognisable by a court of justice.

2. Injunctions to prevent a tort, *i.e.*, a wrong independent of contract.

It may be laid down as a general rule, that wherever a right exists, or is created, a violation of that right will be prohibited, subject to the limitation that the right is cognizable by law. It follows, therefore, that the restraining process of equity will apply to the whole range of rights and duties which are recognised as enforceable at law. But it should also be remembered that though the jurisdiction of equity is in principle so extensive, it is restrained and modified by considerations of expediency and convenience; and that equity will not interfere where the breach of a duty or the violation of a right may be completely and adequately paid for by damages at law, or where other reasons of justice and convenience are against the intervention of equity. It

<sup>1</sup> Piggott v. Stratton, 1 De G. F. & Jo. 33; Slim v. Croucher, 1 De G. F. & Jo. 518.

<sup>2</sup> Nicholson v. Hooper, 4 My. & Cr. 186.

<sup>3</sup> Neesom v. Clarkson, 4 Hare, 97; Dunn v. Spurrier, 7 Ves. 235.



is proposed now to consider a few of the more important and representative cases in which equity interferes by injunction to restrain breaches of duty or violation of rights.

1. In cases of waste.

1. Jurisdiction  
in cases of waste.

Waste may be defined as a destructive or material alteration of things forming an essential part of the inheritance.<sup>1</sup>

The jurisdiction of equity to restrain waste arose, as in most other cases, from the original incompetency of the common law to give adequate relief. The ancient jurisdiction at common law with regard to waste may be thus shortly stated. By the Statutes of Marlebridge,<sup>2</sup> of Gloucester,<sup>3</sup> and of Westminster,<sup>4</sup> a writ of waste might be brought by him who had the immediate estate of inheritance in reversion or remainder against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years; it might also be brought by one tenant in common or joint-tenant against another who wasted the estate held in common or joint-tenancy. But it did not lie between *coparceners*;<sup>5</sup> and in many other cases also the courts of law had no effective jurisdiction in waste.

Arose from incompetency of common law. Common law powers over waste.

Courts of equity, on the other hand, by no means limited themselves to an interference in the cases above mentioned provided for by statute. They extended this salutary relief to cases where the remedies provided in the courts of common law could not be made to apply; and to cases where the titles of the parties were purely of an equitable nature; and to cases where the waste was what is commonly

In what cases equity interferes.

<sup>1</sup> Tudor's Real Property Cases, 90.

<sup>2</sup> 52 Hen. III.

<sup>3</sup> 6 Edw. I. c. 5.

<sup>4</sup> 13 Edw. I. c. 22.

<sup>5</sup> 3 Black. Com. 227, 228; *Jefferson v. Bishop of Durham*, 1 Bos. & Pull. 120.

Equitable waste.

although with no great propriety of language, termed equitable waste,<sup>1</sup> meaning acts which were deemed waste only in courts of equity; and to cases where no waste had been actually committed, but was only meditated or apprehended; equity, in all these cases, interfered by a bill *quia timet*, or other bill for an injunction.<sup>2</sup>

Cases where a person is punishable at law.

In the first place there were many cases where a person was punishable at law for committing waste, and yet a court of equity would enjoin him. As where there was a tenant for life, remainder for life, remainder in fee, the tenant for life would be restrained by injunction from committing waste; although, if he did commit waste, no action of waste could lie against him at law by the remainder-man for life, for he had not the inheritance; nor by the remainder-man in fee, by reason of the interposed remainder for life.<sup>3</sup>

As where a tenant for life abuses his legal right to commit waste.

So where a tenant for life held his estate without impeachment of waste, he might fell timber, open new mines or pits and have full property in the produce.<sup>4</sup> This was his legal right, and if, in exercising that right, he was guilty of malicious, extravagant, and capricious waste such as pulling down and dismantling a mansion-house,<sup>5</sup> or felling timber planted or left standing for ornament or shelter of a mansion-house or grounds,<sup>6</sup> there was no remedy at common law, yet he would be restrained in equity.

Tenant in tail after possibility of issue extinct.

And the same rule was applied to a tenant in tail after possibility of issue extinct, who had the same

<sup>1</sup> Downshire v. Sandys, 6 Ves. 109, 110.

<sup>2</sup> Story, 912. [Kane v. Vanderberg, 1 Johns. Ch. 4.]

<sup>3</sup> Garth v. Cotton, 1 Ves. Sr. 524, 555, s. c.; 1 Smith L. C. 751.

<sup>4</sup> Co. Litt. 220 a; Lewis Bowles's Case, 11 Co. 79 b.

<sup>5</sup> Vane v. Barnard, 2 Vern. 738.

<sup>6</sup> Rolt v. Somerville, 2 Eq. Ca. Abr. 759; Morris v. Morris, 15 Sim. 505; Micklethwaite, v. Micklethwaite 1 De G & J. 519.

power to commit waste as a tenant for life, without impeachment of waste.<sup>1</sup>

In the next place, courts of equity granted an injunction in cases where the aggrieved party had a purely equitable right, and, indeed, it has been said that these courts would grant it more strongly where there was a trust estate.<sup>2</sup> Thus, for instance, in cases of mortgages, if the mortgagor in possession should fell timber on the estate, and thereby the security would become insufficient, but not otherwise, a court of equity would restrain the mortgagor by injunction.<sup>3</sup> On the other hand, a mortgagee in possession would not be permitted to waste the estate, unless the security proved defective, in which case the court would not restrain him from felling timber, the produce being, of course, applied in ease of the estate.<sup>4</sup>

Cases where the aggrieved party has purely an equitable title.

Mortgagor and mortgagee.

It seems that courts of equity had no jurisdiction in cases of permissive waste by a tenant for life having the legal estate;<sup>5</sup> permissive waste being defined as an act of omission—as not doing repairs, whereby houses were suffered to fall into decay.<sup>6</sup> Moreover, no injunction will now be granted to stay ameliorative waste.<sup>7</sup>

Permissive waste not remediable in equity.

## 2. In cases of nuisances.

2. Nuisances.

In cases of public nuisances, properly so called, an indictment or a criminal information lies to abate them, and to punish the offenders. But a civil information lies in equity to redress the grievance by way of injunction. Thus, informations have been

Public nuisances abated by indictment, but sometimes also by an injunction on information filed.

<sup>1</sup> *Atty.-Gen. v. D. of Marlborough*, 3 Madd. 538; *Abrahall v. Bubb*, 2 Swanst. 172.

<sup>2</sup> *Robinson v. Litton*, 3 Atk. 209.

<sup>3</sup> *King v. Smith*, 2 Hare, 239; *Russ v. Mills*, 7 Gr. 145.

<sup>4</sup> *Withrington v. Banks*, Sel. Ch. Ca. 31.

<sup>5</sup> *Powys v. Blagrove*, Kay, 495; 4 De G. M. & G. 448.

<sup>6</sup> Inst. 145.

<sup>7</sup> *Doherty v. Allman*, 3 App. Ca. 709.

maintained against a public nuisance occasioned by stopping a highway.<sup>1</sup>

Public nuisance causing special damage,—ground for a merely civil action.

As a general rule, a suit of this nature is instituted by the Attorney-General, or he is made a party, as representing the public. But when a private person suffers a special and peculiar injury, distinct from that of the public in general, in consequence of a public nuisance, he will be entitled to an injunction and relief in equity, and he may thus compel the wrong-doer to take active measures against allowing the injury to continue, and in such case the Attorney-General is not a necessary party to the action.<sup>2</sup>

Equity has jurisdiction in cases of private nuisances,—in a merely civil action.

In regard to private nuisances, the interference of Courts of Equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing vexatious and interminable litigation, or of preventing multiplicity of suits. It is not, however, every nuisance that will justify the interposition of a court of equity. There must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanently or increasingly mischievous character, must occasion a constantly recurring grievance, which cannot be otherwise prevented, save by an injunction.<sup>3</sup> Thus it has been said, that every common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary. But if it is continued so long as to become a nuisance, the person committing it ought to be restrained; so also, if there is a claim of right

<sup>1</sup> *Atty.-Gen. v. Cleaver*, 18 Ves. 217; *Ripon v. Hobart*, 3 My. & K. 169, 179.

<sup>2</sup> *Wood v. Sutcliffe*. 2 Sim. N. S. 163. [*Coining v. Lowene*, 6 Johns. Ch. 437.]

<sup>3</sup> *Fishmongers' Co. v. East India Co.*, 1 Fick. 163.

to do it, that is a sufficient ground for an injunction <sup>1</sup>  
 So a mere fanciful diminution of the value of property by a nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.<sup>2</sup>

On the other hand, where the injury is irreparable, <sup>Where injury is irreparable.</sup> as where loss of health,<sup>3</sup> loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act, in every such case courts of equity will interfere by injunction.<sup>4</sup>

### 3. Cases of patents, copyright, and trade-marks. <sup>3. Patents, copyright, and trade-marks.</sup>

It is in order to prevent irreparable mischief, or to suppress multiplicity of suits and vexatious litigation, that courts of equity interfere in cases of patents for inventions, and in cases of copyrights to secure the rights of the inventor or author.

It is quite plain that if no other remedy could be given in cases of patent and copyright than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights. Besides, in cases of this nature, mere damages would often give most inadequate relief. For example, in the case of a copyright, the sale of copies by the defendant is not only in each instance taking from the author the profit upon the individual book, which he might otherwise have sold, but it may also be injuring him to an incalculable extent in regard to the value and disposition of his copyright, which no inquiry for <sup>Damages at law utterly inadequate.</sup>

<sup>1</sup> *Pennington v. Brinsop Hall Coal Co.*, L. R. 5 Ch. Div. 769; and see *Goodson v. Richardson*, L. R. 9 Ch. App. 221.

<sup>2</sup> *Atty.-Gen. v. Nicholl*, 16 Ves. 342; and see *Sturges v. Bridgeman*, 11 Ch. Div. 852.

<sup>3</sup> *Walter v. Selfe*, 20 L. J. Ch. 433.

<sup>4</sup> *Wynstanley v. Lee*, 2 Swanst. 335; *Broadbent v. Imp. Gas Co.*, 7 De G. M. & G. 436. [*Cleveland v. Citizens Gas Light Co.*, 5 C. E. Green, 20.]

Jurisdiction,  
when exercised.

the purpose of damages could fully ascertain.<sup>1</sup>

The jurisdiction will be exercised in all cases where there is a clear color of title, founded upon long possession and assertion of right. Even an equitable interest, limited in point of time or extent, is sufficient. But a mere agent to sell has not such a real interest in a work as will entitle him to relief.<sup>2</sup> The question of piracy or no piracy is at the present day usually decided by the court, on a personal inspection of the book; but if necessary, an issue will be directed at law.<sup>3</sup>

Copyright.  
No copyright in  
irreligious, im-  
moral, or libel-  
lous works.

There are some peculiar principles applicable to cases of copyright, which are not generally applicable to patents for inventions. In the first place, the plaintiff must make out his title to the copyright, by registration and otherwise. Secondly, no copyright can exist consistently with principles of public policy in any work of a clearly irreligious, immoral, libellous, or obscene description; because, in order to establish such a claim, the author must in the first place show a right to sell the work, and this he cannot do, he himself being unable to acquire a property therein.<sup>4</sup> In the case of an asserted piracy of such a work, if it be a matter of any real doubt whether it falls within such a description or not, courts of equity will not interfere by injunction to prevent or restrain the piracy, but will leave the party to his remedy at law.<sup>5</sup>

What is an  
infringement of  
copyright.

In the next place, in cases of copyright, difficulties often arise in ascertaining whether there has been actual infringement thereof. It is, for instance, clearly settled not to be an infringement of the copyright of a book to make *bona fide* quota-

<sup>1</sup> Hogg v. Kirby, 8 Ves. 223.

<sup>2</sup> Nicol v. Stockdale. 3 Swanst. 687.

<sup>3</sup> Copinger on Copyright, 118, 119.

<sup>4</sup> Copinger on Copyright, 48.

<sup>5</sup> Lawrence v. Smith, Jacob, 472; Walcot v. Walker, 7 Ves. 1.

tions or extracts from it, or a *bona fide* abridgment of it, or to make a *bona fide* use of the same common materials in the composition of another work. But what constitutes a *bona fide* use of extracts, or a *bona fide* abridgement, or a *bona fide* use of common materials, is often a matter of most embarrassing inquiry. The true question, it has been said, in all these cases, is, whether there has been a legitimate use of the copyright publication, by the fair exercise of a mental operation deserving the character of a new work.<sup>1</sup> But if one, instead of searching into the common sources, and obtaining his materials from them, should avail himself of the labor of his predecessor, and adopt his arrangement, or do it with only a colorable variation, it would be an infringement of the copyright. But it is no infringement where an author has been led by an earlier writer to consult authorities referred to by him, even though he may quote the same passages from those authorities which were used by the earlier writer.<sup>2</sup> Neither is it an infringement if nothing material is taken.<sup>3</sup>

*Bona fide* quotations, a *bona fide* abridgment, or *bona fide* use of common materials, not an infringement.

Identical quotations,—even when suggested by earlier writers

The general doctrine on copyright in publications of the class of maps, road-books, calendars, chronological and other tables is not very easily reducible to any accurate definition. Here the materials being equally open to all, there must be a close identity or similitude in the very form and use of the common materials. The difficulty here is to distinguish what belongs to the exclusive labors of a single mind, from what are the common sources of the materials of the knowledge used by all. Suppose, for instance, the case of maps; one man may publish the map of a country; another man, with the

Maps, calendars, tables, &c.

<sup>1</sup> Campbell v. Scott, 11 Sim. 31; Lewis v. Fullarton, 2 Beav. 6.

<sup>2</sup> Pike v. Nicholas, L. R. 5 Ch. 251.

<sup>3</sup> Chatterton v. Cave, 3 App. Cas. 483.

same design, if he has equal skill and opportunity, may by his own labor produce almost a fac-simile. He has certainly a right to do so. But he is not at liberty to copy that map, and claim it as his own. He may work on the same original materials; but he cannot exclusively and evasively use those already collected and embodied by the skill, industry, and expenditure of another. The fact of copy or no copy is generally ascertained, in the absence of direct evidence, by *the appearance in the alleged copy of the same inaccuracies or blunders that are to be found in the first published work*. But this is a mode of inference which must be applied with caution.<sup>1</sup>

Copyright in  
lectures.

In *Abernethy v. Hutchinson*,<sup>2</sup> it was held that when persons are admitted as pupils or otherwise to hear lectures, although they were orally delivered, and although the parties might go to the extent of putting down the whole by means of shorthand, yet they can do that only for the purposes of their own information, and cannot publish for profit that which they have not obtained the right of selling. And, consequently, another person, who in the absence of evidence as to how he came by them, must in the opinion of the court have obtained them from a pupil, would be restrained. Copyright in lectures is now, under certain conditions, protected by legislative enactment.<sup>3</sup>

Copyright in  
title of book.

There may be a valid copyright in the mere title to a book, *e.g.*, in the title "Trial and Friendship."<sup>4</sup>

Copyright in let-  
ters on literary  
subjects or  
private matters.

As to private letters, whether on literary subjects or on matters of private business, personal friendships or family concerns, a learned writer lays down

<sup>1</sup> *Wilkins v. Aiken*, 17 Ves. 424; *Longman v. Winchester*, 16 Ves. 269.

<sup>2</sup> 1 H. & Tw. 40; s. c. 3 L. J. Ch. 209.

<sup>3</sup> 5 & 6 Will. IV. c. 65.

<sup>4</sup> *Weldon v. Dicks*, 10 Ch. Div. 247.



the following conclusions:—<sup>1</sup>

1. That the writer of private letters has such a qualified right of property in them as will entitle him to an injunction to restrain their publication by the party written to, or his assignees.<sup>2</sup>

1. The writer may restrain their publication.

2. That the party written to has such a qualified right of property in the letters written to him as will entitle him, or his personal representative, to restrain the publication of them by a stranger.<sup>3</sup>

2. The party written to may also restrain their publication by a stranger.

3. That such qualified right may be displaced by reasons of public policy, or by some personal equity.<sup>4</sup>

3. Publication permitted on grounds of public policy.

An injunction will be granted to restrain the publication of an unpublished manuscript. This doctrine appears to have been first established in the case of the *Duke of Queensberry v. Shebbeare*.<sup>5</sup> In that case, the plaintiff claimed, as administrator of A., a descendant of Lord Clarendon, to restrain the defendant from publishing the "History of the Rebellion;" and the defendant claimed, under a delivery by A. of the original manuscript to the father of another defendant, with permission to take a copy and make what use he thought fit of it. But it was held, that it was not to be presumed that Lord Clarendon meant the defendant's ancestor to have the profit of multiplying the work in print, though he might make any other use of it except that.<sup>6</sup>

Injunction against publication of an unpublished manuscript.

(C.) With regard to the use of trade-marks, and generally to the enjoyment of a particular trade designation, the right to protection does not seem to

(C.) Trade-marks. Injunction against use of trade-marks does not depend on property, but

<sup>1</sup> Drew. on Inj., 208, 209. [Folsom v. Marsh, 2 Story, 100.]

<sup>2</sup> Pope v. Curl, 2 Atk. 342; Gee v. Pritchard, 2 Swanst. 402.

<sup>3</sup> Granard v. Dunkin, 1 Ball & Beat. 207; Thompson v. Stanhope, Amb. 737.

<sup>4</sup> Perceval v. Phipps, 2 V. & B. 19; Joyce on Injunctions, 351, 352.

<sup>5</sup> 2 Eden. 329; Copinger on Copyright, 24-33.

<sup>6</sup> Prince Albert v. Strange, 1 Mac. & G. 25; 1 H. & Tw. 1.

because equity  
will not permit  
fraud.

depend upon a property in them, but on the principle that *the court will not allow fraud to be practised upon a private individuals or upon the public.* "This right cannot properly be described as a copyright; it is, in fact, a right which can be said to exist only, and can be tested only, by its violation: it is the right which any person designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark."<sup>1</sup>

*Burgess v. Burgess*  
A man cannot  
be restrained  
from using his  
own name as  
vendor of an  
article.

The principle will be seen by a comparison of the following cases. In *Burgess v. Burgess*,<sup>2</sup> where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the court would not restrain his son from selling a similar article under that name, no fraud being proved. Knight Bruce, L. J., said—"All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers had done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers; nor is there anything else that this defendant has done in question before us. He follows the same trade as that his father follows, and has long followed, namely, that of manufacturer and seller of pickles, preserves, and sauces; among them one called 'Essence of Anchovies.' He carries on the trade in his own name,

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<sup>1</sup> *Farina v. Silverlock*, 6 De G. M. & G. 217. And see Trade-Marks Registration Act, 1875 (38 & 39 Vict. c. 91). and the Amendment Act, 1876 (39 & 40 Vict. c. 33); and *In re Mitchell's Trade-Mark*, 7 Ch. Div. 36; *Singer Manuf. Co. v. Loog*. W. N. 1879, p. 152. [*Filley v. Fassett*, 44 Mo. 168.]

<sup>2</sup> 3 De G. M. & G. 897.

and sells his essence of anchovies as 'Burgess's Essence of Anchovies,' which, in truth, it is. If any circumstance of fraud, now material, had accompanied, and were continuing to accompany, the case, it would stand very differently. The whole ground of complaint is the great celebrity which, during many years, has been possessed by the elder Burgess's essence of anchovies. That does not give him such an exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovies, and selling it under his own name."<sup>1</sup> In the case of *Cocks v. Chandler*,<sup>2</sup> the bill was filed by the successor in title of the inventor of a sauce known as "Reading Sauce," to restrain a rival manufacturer from selling his preparation under the name of "The Original Reading Sauce," and on proof by the plaintiff that he alone was entitled to the original receipt, and that on that ground his sauce had attained a high reputation in the market, an injunction was granted against the use by the defendant of the word "original," as *being a device to mislead the public*.<sup>3</sup>

If there be no fraud on his part.

*Cocks v. Chandler*  
—Use of word "Original" a fraud on the public.

<sup>1</sup> See also *Christie v. Christie*, W. N. 1875, p. 3; *Cope v. Evans*, L. R. 18 Eq. 138.

<sup>2</sup> L. R. 11 Eq. 446; *Marshall v. Ross*, L. R. 8 Eq. 651; *Crawford v. Shuttock*, 13 Gr. 149; *Davis v. Kennedy*, 13 Gr. 523.

<sup>3</sup> See also *Raggett v. Findlater*, L. R. 17 Eq. 29; *Cheavin v. Walker*, L. R. 5 Ch. Div. 850; *Siegart v. Findlater*, 37 Ch. Div. 801; *Braham v. Brachim*, 7 Ch. Div. 848.

## CHAPTERS XI AND XII.

## PARTITION.

ANOTHER head of Concurrent Jurisdiction is that of partition of real estate, when held by joint-tenants or tenants in common.

Origin of jurisdiction.

The ground of this jurisdiction has been thus stated by Lord Redesdale:—"In the case of partition of an estate if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partitions, which are affected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required, and upon return of the commission, and confirmation of that return by the court, the petition is finally completed by mutual conveyances of the allotments made to the several parties.<sup>1</sup>

Writ of partition at law inadequate

The common law remedy by writ of partition was at an early period found inadequate and incomplete, on account of the various and complicated interests which in process of time arose out of or attached to the ownership of real estate. Moreover, courts of

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<sup>1</sup> Mitford on Pleading, 220. [Hall v. Piddock, 6 C. E. Green 314.]

law were content merely to declare the rights of the parties, and were incapable of effectuating the petition by directing the execution of mutual conveyances. It was for these and other reasons, *e.g.*, the necessity of the discovery of titles, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of courts of equity, and their ability to clear away all intermediate obstructions against complete justice, that these latter courts assumed a general concurrent jurisdiction with courts of law in all cases of partition. And in so doing they usually followed the analogies of the law; and decreed partition in such cases as the courts of law recognized as fit for their interference. But courts of equity were not, therefore, to be understood as limiting their jurisdiction in partition to cases cognizable or relievable at law; for there was no doubt that they might interfere in cases where a partition would not be at law; as, for instance, where an equitable title was set up.<sup>1</sup>

[The methods of partition are, in most of the United States, laid down by statutory enactments which in some jurisdictions have and in some have not superseded the remedy by bill in equity.]<sup>2</sup>

#### INTERPLEADER.

Where two or more persons, whose titles were connected by reason of one being derived from the other, or of both being derived from a common source, claimed the same thing, by different interests, from a third person, and he, not knowing to which of the claimants he ought of right to render it, feared he might be hurt by some of them, he

Interpleader where two or more persons claim the same thing from a third person.

<sup>1</sup> Wills v. Slade, 6 Ves. 498; Cartwright v. Pultee, 2n Atk. 308.

<sup>2</sup> [See Smith v. Smith 10 Paige, 470; Bisph. Eq. § 488.]

might exhibit a bill of interpleader against them. In this bill he must have stated his own rights and their several claims, and prayed that they might interplead, so that the court might adjudge to whom the thing belonged and he might be indemnified. If any suits at law were brought against them, he might also pray that the claimants be restrained from proceeding till the right was determined.<sup>1</sup> And similarly an injunction would be granted in an interpleader suit, to restrain proceedings in another suit relating to the same subject-matter, imperfect in its frame for lack of parties.<sup>2</sup>

Interpleader at law only in cases of joint bailment.

The remedy by interpleader was not unknown to the common law; but it had a very narrow range of purpose and application. The interpleader at law only existed where there was a joint bailment by both parties.<sup>3</sup>

The true origin, then, of the jurisdiction in equity over interpleader was, that there was either no remedy at law, or the legal remedy was inadequate in the given case.

[In the United States the right of interpleader has by statute been extended to the courts of law; in some States the equitable proceeding must still be restored to.]<sup>4</sup>

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<sup>1</sup> Mitford on Pleading, 58, 59; Jones v. Thomas, 2 Sm. & Giff. 186.

<sup>2</sup> Prudential Assurance Company v. Thomas, L. R. 3 Ch. 74.

<sup>3</sup> Crawshay v. Thornton, 2 My. & Cr. 1, 21.

<sup>4</sup> [Bisph. Eq. § 419; see Ramsdall v. Butler, 60 Me. 216.]

## PART IV.

### *THE AUXILIARY JURISDICTION.*

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#### CHAPTER I.

##### DISCOVERY.

Every bill in equity might properly have been deemed a bill of discovery, since it sought a disclosure from the defendant, on his oath, of the truth of the circumstances constituting the plaintiff's case, as propounded in his bill. Bill of discovery, nature of.

But that which was *par excellence* called a bill of discovery, was a bill which asked no relief, but simply the discovery of facts resting in the knowledge of the defendant, or the discovery of deeds or writings, or other things, in the possession or power of the defendant, in order to maintain the right or title of the party asking it, in some suit or action or other proceeding in another court. [Such bills are not now of the importance they formerly were as the statutes of the States generally provide for a similar relief. Nevertheless the history and rules of

this equitable proceeding will be considered briefly in this place.]

Generally an action must already have been commenced.

In general, it was necessary, in order to maintain a bill of discovery, that an action should have been already commenced in another court, to which the discovery would be auxiliary. There were, however, exceptions to this rule, as where the object of the discovery was to ascertain who was the proper party against whom the suit or action should be brought. But these cases were of rare occurrence.<sup>1</sup>

Jurisdiction in equity arose because at law defendant could not be examined on oath, or be compelled to produce documents.

The power of the courts of equity to compel discovery arose principally from the original inability of courts of common law to compel a complete discovery of the material facts in controversy by the oaths of the parties to the suit, and also from their original want of power to compel the production of deeds, documents, writings, and other things which were in the custody or power of one of the parties, and were material to the right, title, or defence of the other. Bills of discovery were greatly favored in equity, inasmuch as they tended to assist and promote the administration of justice in others, and they would be sustained in all cases where some well-founded objection did not exist against the exercise of the jurisdiction.

Defences to a bill of discovery.

The principal grounds upon which a bill of discovery might have been resisted were as follows:—1. That the subject was not cognizable in any court of justice. 2. That the court would not lend its aid to obtain a discovery for the particular court for which it was wanted. 3. That the plaintiff was not entitled to the discovery by reason of personal liability. 4. That the plaintiff had no title to the character in which he sued. 5. That the value of the suit was beneath the dignity of the court. 6. That the

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<sup>1</sup> See *Angell v. Angell*, 1 Sim. & Stu. 83; *City of London v. Levy*, 8 Ves. 404.



plaintiff had no interest in the subject matter, or title to the discovery required, or that an action would not lie for that for which it was wanted. 7. That the defendant was not answerable to the plaintiff, but that some other person had a right to call for the discovery. 8. That the policy of the law exempted the defendant from the discovery. 9. That the defendant was not bound to discover his own title. 10. That the discovery was not material in the suit. 11. That the defendant was a mere witness. 12. That the discovery called for would subject the defendant to a penalty, or forfeiture, or to a prosecution.<sup>1</sup>

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<sup>1</sup> [Skinner v. Judson, 8 Conn. 528.]

## CHAPTERS II. AND III.

BILLS TO PERPETUATE TESTIMONY, BILLS QUIA TIMET  
AND BILLS OF PEACE.

I. Bills to perpetuate testimony.  
To preserve evidence in danger of being lost before a question could be litigated

I. THE object of bills to perpetuate testimony was to preserve and perpetuate evidence when it was in danger of being lost, before the matter to which it related could be made the subject of judicial investigation. Bills of this sort were obviously indispensable for the purposes of public justice, as it might be utterly impossible for a party to bring his rights presently to a judicial decision; and unless, in the meantime, he might perpetuate the proofs of those rights, they were in danger of being lost without any default on his side.

The objection was, that the depositions were not published till after death of witness.

The jurisdiction which courts of equity exercised to perpetuate testimony was open to one great objection. The depositions were not published until after the death of the witnesses. The testimony, therefore, had this infirmity, that it was not given under the sanction of those penalties which the law attaches to the crime of perjury. It was for this reason chiefly that courts of equity did not generally entertain such bills, unless where it was absolutely necessary to prevent a failure of justice.<sup>1</sup>

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<sup>1</sup> Angell v. Angell, 1 Sim. & Stu. 83.

If, therefore, it were possible that the matter in controversy could be made the subject of immediate judicial investigation, by the party who sought to perpetuate the testimony, courts of equity would not entertain a bill for the purpose. For the party, under such circumstances, had it fully in his power to terminate the controversy by commencing the proper action; and therefore there was no reason for giving him the advantage of deferring his proceedings to a future time, and for substituting written depositions for *viva voce* evidence.<sup>1</sup> But, on the other hand, if the party who filed the bill could by no means bring the matter in controversy into immediate judicial investigation (which might have happened when his title was in remainder), or if he himself was in actual possession of the property, with reference to which he sought to perpetuate the testimony, in either of these cases equity would entertain a suit for that purpose.<sup>2</sup>

If matter could be at once litigated, equity refused to perpetuate testimony.

But equity would not refuse if the matter could not by any means be at once litigated.

II. There was another species of bill, having a close analogy to that to perpetuate testimony, and often confounded with it, but which, in reality, stood upon different considerations. These were bills to take testimony *de bene esse*, and bills to take the testimony of persons resident abroad, *to be used in suits actually pending in the courts*. There was this broad distinction between bills of this sort and bills to perpetuate testimony, that the latter were, and could be brought by persons only who were in possession, under their title, and who could not sue at law, and thereby have an opportunity to examine their witnesses in such suit, while bills to take testimony *de bene esse* might be brought, not only by persons in possession, but by persons who were out of possession, in aid of the trial at law. There was

II. Bills to take testimony *de bene esse*.

How distinguished from bills to perpetuate testimony.

<sup>1</sup> *Ellice v. Roupell*, (No. 1,) 32 Beav. 299.

<sup>2</sup> *Story*, 1508; *Earl Spencer v. Peek*, L. R. 3 Eq. 415.

also another distinction between them, which was that bills *de bene esse* could be brought only when an action was then depending, and not before,<sup>1</sup> while bills to perpetuate testimony were only allowed where no action was pending, or could be commenced.

### III. *Quia timet*.

In order to prevent wrongs.

Appointment of receivers.

Directing security to be given.

Granting Injunctions.

IV. Bills of peace,—how distinguished from bills *quia timet*.

Bills of peace,—their object.

III. Bills *quia timet* were in the nature of writs of prevention, to accomplish the ends of precautionary justice. The party sought the aid of the court because he feared (*quia timet*) some future probable injury to his rights or interests, and not because an injury had already occurred which required compensation or other relief. The nature of the relief given by courts of equity was dependent on circumstances. They interfered sometimes by the appointment of a receiver of rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given, or money to be paid over, and sometimes by the mere issuing of an injunction, or other remedial process, thus adapting their relief to the precise nature of the particular case and the remedial justice required by it.

IV. Bills of peace bore some resemblance to bills *quia timet*. Bills *quia timet*, however, were distinguished from bills of peace in several respects; because bills *quia timet* were always used as a preventive process, before a suit was actually instituted, while bills of peace, although sometimes brought before any suit was instituted to try a right, were most generally brought after the right had been tried at law.

By a bill of peace was to be understood a bill brought by a person to establish and perpetuate a right which he claimed, and which from its very nature, might be controverted by different persons, at

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<sup>1</sup> Story 1513; *Angell v. Angell*, 1 Sim. & Stu. 83.

different times, and by different actions; or where separate attempts had already been unsuccessfully made to overthrow the same right, and justice required that the party should be quieted in the right, if it was already sufficiently established, or if it should be sufficiently established under the direction of the court. The obvious design of such a bill was to secure repose from perpetual litigation, and was founded on that general doctrine of public policy, which, in some form or other, may be found in the jurisprudence of every civilized country, that an end ought to be put to litigation, and above all to hopeless and vexatious litigation (*Interest reipublicæ ut sit finis litium*).

One class of cases to which this remedial process was properly applied, was where there was one general right to be established against a great number of persons. And it might be resorted to either where one person claimed or defended a right against many, or where many claimed or defended a right against one.<sup>1</sup> Courts of equity having a power to bring all the parties before them, would, in order to prevent multiplicity of suits, at once interpose, and proceed to the ascertainment of the general right; and if it were necessary, they would ascertain it by an action or issue at law, and then make a decree finally binding on all the parties.<sup>2</sup>

Bills of this nature might have been brought by a lord against his tenants to recover an encroachment made under color of a right of common; by a party interested, to establish his right to a toll due by custom, or to the profits of a fair. So where a party claimed to be in possession of a right of fishing for a considerable distance in a river, and the riparian proprietors set up several adverse rights,

<sup>1</sup> Sheffield Waterworks v. Yeomans, L. R. 2 Ch. 8.

<sup>2</sup> [Cadigan v. Brown, 120 Mass. 473.]

*Sheffield Water-works v. Yeomans*,—multitudinous defendants, with identical question of law against each.

he might have a bill of peace against all of them to establish his right and quiet his possession.<sup>1</sup> So in *The Sheffield Waterworks v. Yeomans*,<sup>2</sup> a bill having been filed against Y. and five other defendants, on behalf of themselves and all other the persons named in certain alleged certificates, praying in effect that the certificates (about 1500 in number, held by different owners) might be declared void, and be delivered up to be cancelled, and new valid certificates issued in lieu thereof, the question as to the validity of these certificates being the only question to be decided in the suit—it was held that, though the claims of the defendants were not identical, yet, as they all involved the same question of validity, the bill would lie, as being in the nature of a bill of peace.

Where a party has conclusively established a right, and is threatened with fresh litigation.

Another class of cases, and one in which bills of peace were more ordinarily resorted to, was where the plaintiff had, after repeated and satisfactory trials, established his right at law, and yet was in danger of further litigation and obstruction to his right from new attempts to controvert it. Thus, in the case of *Earl of Bath v. Sherwin*,<sup>3</sup> where the title to land had been five several times tried in an ejectment, and five several verdicts had been given in favor of the plaintiff, the House of Lords granted a perpetual injunction, upon the ground that it was the only adequate means of suppressing vexatious litigation, the expense and continuance of which was doing irreparable mischief. Courts of equity would not, however, have interfered in such cases before a trial at law, nor until the right had been satisfactorily established at law; latterly, however,

Ejectment,—repetition of, growing oppressive.

<sup>1</sup> *Mayor of York v. Pilkington*, 1 Atk. 282.

<sup>2</sup> L. R. 2 Ch. 8.

<sup>3</sup> Prec. Ch. 261; 4 Bro. P. C. 373,

by Rolt's Act,<sup>1</sup> the Court of Chancery might in its discretion either direct an issue to be tried at the assizes or at *nisi prius*, where the circumstances rendered such a course advisable, or might itself decide the question of law or fact.

It seems that courts of equity would not, upon a bill of this nature, decree a perpetual injunction for the establishment of the right of a party who claimed in contravention of a public right, as if he claimed an exclusive right to a highway, or to a common navigable river; for it was said, that would be to enjoin all the people of the State or country. But the true principle was, that courts of equity would not, in such cases, upon principles of public policy, intercept the assertion of public rights, and that in fact the right claimed was impossible in law.

No perpetual injunction in favor of a private right in contravention of a public right.

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<sup>1</sup> 25 and 26 Vict. c. 42, s2.

## CHAPTER IV.

## CANCELLING AND DELIVERY UP OF DOCUMENTS.

Instrument ordered to be delivered up—when?

The Court of Chancery frequently cancelled, or rescinded, or ordered to be delivered up, instruments of a distressful or obnoxious character, and that whether they were voidable, or were in fact void. The jurisdiction exercised in cases of this sort was founded upon the administration of a protective or preventive justice, in analogy to the principle *quia timet*, that is, for fear that such instruments might afterwards be vexatiously or injuriously used, when the evidence to impeach them was lost, or that they might be already clouding the title or interest of the party.<sup>1</sup>

Granting of such a decree not a matter of right, but of judicial discretion in the court.

Upon such an application to the court, it was not a matter of absolute right in the plaintiff, but it was a matter of judicial discretion for the court to grant or to refuse the relief prayed, according to its own notion of what was proper. Thus, a court of equity would sometimes refuse to decree specific performance of an agreement, and, at the same time, might decline to order the agreement to be

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<sup>1</sup> Cooper v. Joel, 27 Beav. 313; Williams v. Bull, 32 Beav. 574; Onions v. Cohen, 2 H. & M. 354; Peake v. Highfield, 1 Russ. 559.



delivered up, cancelled, or rescinded: and, again, the court might order an agreement to be rescinded or cancelled upon the application of the one party, and yet decline to interfere at the instance of the other.

For example, voluntary agreements, although free from fraud, were not enforceable in a court of equity, and yet they would not ordinarily be set aside by the court, being free from fraud. If a man would improvidently bind himself in a voluntary deed, and not reserve a liberty to himself by a power of revocation, a court of equity, as was quaintly stated in an old case, would not loose the fetters he had put on himself, but would leave him to lie down under his own folly.<sup>1</sup> And this doctrine has never been narrowed by the latter decisions, the absence of a power of revocation in a voluntary deed not throwing upon the person seeking to uphold the deed the onus of proving in the first instance that such a power was intentionally excluded by the donor.<sup>2</sup> And even in those cases in which the court would grant relief, it imposed such terms as it thought fit upon the plaintiff, upon the maxim, he who seeks equity must do equity; and if he refused to comply with such terms, his bill was dismissed.

Voluntary deed or agreement, not ordinarily relieved against.

If court granted relief, it did so on terms.

A party had a right to come into equity to have agreements, deeds, or securities cancelled, rescinded, or delivered up, where he had a defence to them good in equity, but not capable of being made available at law.

Where plaintiff had good defence to an instrument in equity, though not at law.

Courts of equity would also, in general, set aside and cancel agreements and securities which were

1. Voidable instruments, — (a) When cancelled.

<sup>1</sup> See *Villers v. Beaumont*, 1 Vern. 101; *Bill v. Cureton*, 2 My. & K. 503; *Petre v. Espinasse*, 2 My. & K. 496.

<sup>2</sup> *Hall v. Hall*, L. R. 8 Ch. App. 430; and distinguish *Coutts v. Acworth*, L. R. 8 Eq. 558; *Wollaston v. Tribe*, L. R. 9 Eq. 44.

voidable merely, and not void, under the following circumstances:—

Four groups of cases.

1. Where there was some actual fraud in the party defendant, in which the party plaintiff had not participated.

2. Where there was some constructive fraud against public policy, and the party plaintiff had not participated therein.

3. Where there was some constructive fraud against public policy, and although the party plaintiff had participated therein, yet public policy would have been defeated by allowing the instrument to stand.

4. Where there was some constructive fraud in both parties, but they were not both of them *in pari delicto*.

Illustrations of the four groups.

The first two of these four groups of cases occasioned little difficulty to the court; and was manifestly a dictate of natural justice, that a party ought not to be permitted to avail himself of an instrument procured by his own actual or constructive fraud, to the prejudice of a third person not a party to the fraud.

The third group of cases comprised, *e.g.*, gaming securities, which would be decreed to be delivered up, notwithstanding both parties had participated in the fraud, because public policy would be best served by such a course.<sup>1</sup>

The fourth group of cases comprised, *e.g.*, cases in which the party seeking relief had acted under circumstances of oppression, imposition, hardship, or other undue influence, arising either from a great inequality between the ages or conditions of the respective parties, or from some other like occasion.

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<sup>1</sup> Earl of Milltown v. Stewart, 3 Mylne & Craig, 18; W— v. B—, 32 Beav. 574; Quarrier v. Colston, 1 Phillips, Ch. R. 147.

On the other hand, where the party seeking relief was the sole guilty party, or where he had participated equally and deliberately in the fraud or where the agreement which he wanted to set aside was founded on illegality, immorality, or some base or unconscionable conduct on his part; in such cases, courts of equity would leave him to the consequences of his own iniquity, and would decline to assist him to escape from the toils which he had studiously prepared for others, or whereby he had sought to violate with impunity the interests or the morals of society.<sup>1</sup>

Questions often occurred how far courts of equity would or ought to interfere to direct instruments to be delivered up and cancelled, which were utterly void, and not merely voidable. The doubt in the first place, was, whether, the instrument being utterly void and incapable of being enforced even at law the remedial justice of courts of law to protect the party was not adequate and complete, and therefore obviated the necessity of the interposition of courts of equity; and, in the next place, the doubt was, whether the more appropriate remedy would not be the granting a perpetual injunction to restrain the use of the instrument.<sup>2</sup>

But whatever the doubts and difficulties formerly entertained upon this subject, they were put to rest by the more modern decisions, and the jurisdiction of equity to order a delivery up of void documents was in these same decisions fully established, in all cases in which the delivery up of the document might help to prevent the perpetration of some further wrong.<sup>3</sup>

<sup>1</sup> *Franco v. Bolton*, 3 Ves. Jr. 386, 372; *St. John v. St. John*, 11 Ves. 535, 536; *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

<sup>2</sup> *Hilton v. Barrow*, 1 Ves. Jr. 284; *Ryan v. Mackmath*, 3 Bro. C. C. 15, 16.

<sup>3</sup> Mr. Swanston's note to *Davis v. Duke of Marlborough*, 2 Swans. 157.

I. *Voidable instruments* (continued).—  
(b.) When not cancelled.

II. *Void instruments*.—difficulty with.

(a.) When delivered up, and upon what grounds.

The jurisdiction in these cases was founded on the principle of equity that it was better to prevent than to relieve. If an instrument was of such turpitude that it ought not to be used or enforced, it was against conscience for the party holding it to retain it, since he could only retain it for some sinister purpose. If it was a negotiable instrument, it might also have been used for a fraudulent or improper purpose to the injury of some one or other. If it was a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily had a tendency to throw a cloud upon the title. If it was a written agreement, solemn or otherwise, while it existed it was always liable to be applied to improper purposes, and it might be vexatiously litigated at a distance of time, when the proper evidence to repel the claim might have been lost or obscured.<sup>1</sup>

(b.) When not delivered up, and upon what grounds.

But where the illegality of the agreement, deed, or other instrument appeared upon the face of it, so that its nullity could admit of no doubt, and its capacity therefore to be made the means of perpetrating some further wrong was wholly paralysed, there was not the same reason for the interference of a court of equity, to direct it to be cancelled or delivered up. In such a case there could be no danger that the lapse of time would deprive the party of his full means of defence; nor could such a paper throw a cloud upon any title, or diminish any one's security, or be used as a means of vexatious litigation, or for any other sensible injury. And, accordingly, it was fully established that in such cases, courts of equity would not interpose their

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<sup>1</sup> Bromley v. Holland, 7 Ves. 20, 21; Kemp v. Prior, Ves. 248, 249.

authority to order the delivery up of the void instrument.<sup>1</sup>

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<sup>1</sup> *Simpson v. Lord Howden*, 3 Mylne & Cr. 97; *Bromley v. Holland*, 7 Ves. 16; *Threfall v. Lunt*, 7 Sim. 627; *Hurd v. Bilton*, 6 Gr. 145.

## CHAPTER V.

## BILLS TO ESTABLISH WILLS.

Court of Probate.  
Equity dealt with  
wills incidentally

Although courts of equity had no general jurisdiction over wills, the proper court having been as regards personalty the Ecclesiastical Court, and latterly the Court of Probate its successor,<sup>1</sup> and as regards realty the Court of Common Pleas or of the Queen's Bench, and latterly (upon citation of the heir and devisee) the Court of Probate,<sup>2</sup> yet whenever a will came incidentally into question before courts of equity, as when these courts were called upon to execute the trusts of the will, they necessarily acquired some *jurisdiction* regarding wills.<sup>3</sup> In such a case, if the validity of the will was admitted, or already established elsewhere, the courts of equity acted upon it to the fullest extent; but if the parties did not admit the validity of the will, and the same had not been established elsewhere, the court of equity in which the cause was depending would have caused the validity of the will to be established, and for that purpose would either have directed an issue or issues to be tried at

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<sup>1</sup> 20 & 21 Vict. c. 77, ss. 61, 62.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. 630.

the assizes, and upon the finding, or ultimate finding would have declared the will established, or would itself have tried the question and established the will on its own finding, which latter course was called proving the will in chancery *per testes*;<sup>1</sup> and if the will were once established, a perpetual injunction would have been decreed against the heir.

But further, it was often the principal object of a suit in equity, as when brought by devisees, to establish the validity of the will, being a will of real estate, and to obtain thereupon a perpetual injunction against the heir-at-law, to prevent him from contesting its validity in future.<sup>2</sup> In such cases the jurisdiction exercised by courts of equity was analogous to that exercised in cases of bills *quia timet*, and was founded upon the like considerations, in order to give security and repose to titles, while the evidence for them was abundant. And their jurisdiction was assumed because the devisee had no power to actively litigate the validity of the will at law, but was obliged to wait until the heir-at-law commenced an ejectment at law, which action the heir might indeed commence at once, but might also put off until the evidence in support of the will was grown obscure.

Accordingly, in the case of *Boyse v. Rossborough*,<sup>3</sup> it was decided that a devisee in possession was entitled to have the will established against the heir-at-law of the testator, although the heir had brought no action of ejectment against the devisee, although no trusts were declared by the will, and although it was not necessary to administer the estate under the direction of the Court of Chancery.

Devisee might come into equity to establish a will against heir-at-law.

Even though the heir-at-law had brought no ejectment.

<sup>1</sup> See also Rolt's Act, 25 & 26, Vict., c. 42.

<sup>2</sup> *Bootle v. Blundell*, 19 Ves. 494, 509.

<sup>3</sup> *Kay*, 71; 1 K. & J. 124; 3 De G. M. & G. 817; 6 H. L. Cas. 1

Devisee might establish a will against all setting up an adverse right.

And it was further determined that the Court of Chancery had power to establish a will against parties claiming under a prior will, and disputing the plaintiff's claim, a devisee being entitled to have the will established, and his title quieted not only as against the heir but against all persons setting up adverse rights.<sup>1</sup>

The heir-at-law could only come into equity by consent.

But, on the other hand, the heir-at-law could not come into a court of equity excepting by consent of the devisee to have the validity of the will tried. He could not come into equity unless with such consent, because he had a legal remedy by ejectment; if there were any impediments to the proper trial of the merits of such an ejectment, he might have come into equity to have them removed *e. g.*, upon a bill for discovery.<sup>2</sup>

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<sup>1</sup> Lovett v. Lovett, 3 K. & J. 1.

<sup>2</sup> Sm. Man. 409.



## CHAPTER VI.

“NE EXEAT REGNO.” (REIPUBLICÆ).

The writ of *ne exeat regno* was a prerogative writ, <sup>To prevent a person leaving the realm.</sup> which issued, as its name imports, to prevent a person from leaving the realm; in its origin, it was only applied to great political objects and purposes of State, for the safety and benefit of the realm; and such having been the character of its origin, it is at the present day applied in favor of the subject and his private rights with great caution and jealousy.

In general, it may be stated that the writ of *ne exeat regno* would not be granted unless in cases of <sup>General rule,— granted only in cases of equitable debts.</sup> equitable debts and claims, in respect of which it was in the nature of equitable bail. If, therefore, the debt was one demandable at law, the writ would be refused; for in such a case the remedy at law was open to the party.

However, to the general rule, that the writ of *ne exeat regno* lay only in respect of equitable debts <sup>Two exceptions,—</sup> and claims, there were two recognized exceptions, that is to say,—

1. Where alimony had been decreed to a wife, <sup>1. In cases of alimony decreed, where husband intends leaving the jurisdiction.</sup> it would be enforced against a husband by a writ of *ne exeat regno*, if he was about to quit the realm. But the alimony must have been actually decreed:

for if the case was still pending, courts of equity would not have granted the writ.

2. In cases where there is an admitted balance, but plaintiff claims a larger sum.

2. Where there was an admitted balance due by the defendant to the plaintiff, but a larger sum was claimed by the plaintiff, the writ would be issued, for there was not in such a case any real deviation from the appropriate jurisdiction of courts of equity, matters of account having been properly cognizable therein.<sup>1</sup>

The debt must be certain in its nature.

As to the nature of the equitable demand for which a writ of *ne exeat regno* would be issued, it must have been certain as to its nature, and actually payable, and not contingent. It should also have been for some debt or pecuniary demand. The writ would not be issued, therefore, in a case where the demand was of a general unliquidated nature, or was in the nature of damages.<sup>2</sup>

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<sup>1</sup> Sobey v. Sobey, L. R. 15 Eq. 200.

<sup>2</sup> [See MacDonough v. Jaynor, 3 C. E. Green, 249.]

# INDEX.

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## ACCIDENT—

Definition of, and illustrations of. 356.

Cases in which relief is granted,—

Lost bonds, 357.

Lost deed, no ground for coming into equity, 359.

Lost negotiable instruments, 360.

Lost non-negotiable instruments, 361.

Destroyed negotiable and non-negotiable instruments, 361.

Execution of power, 361.

Distinction between mere powers and powers in the nature of trusts, 363.

Accident in payment by executors or administrators, 364.

Where master of minor bound apprentice becomes bankrupt, 364.

Cases in which relief is not granted—

In matters of positive contract, 365.

Contract where parties are equally innocent, 365.

Where party claiming relief has been guilty of gross negligence, 366.

Where other party has an equal equity, 366.

See MISTAKE.

## ACCOUNT—

Origin of jurisdiction in, 437.

Where action of, lay at law, 437.

In what cases, equity allows account, 438.

(1.) Principal against agent, 438.

(1a.) *Cestui qui trust* against trustee, 439.

(2.) Cases of mutual account between plaintiff and defendant, 439.

(3.) Circumstances of great complication, 440.

Matters of defence to suit for an account, 440.

(a.) Settled account, 440.

Leave to surcharge and falsify, 441.

(b.) Laches, 442.

## ACQUIESCENCE—

Where owner of estate stands by, and permits improvements, 41.

*Vigilantibus non dormientibus æquitas subvenit*, 43.

Of *cestui qui trust* in breach of trust, 156.

ADEMPTION OF LEGACY.—see SATISFACTION.

ADMINISTRATION OF ASSETS.—See ASSETS.

ADVANCEMENT—

- Presumption of, as against resulting trust, 118.
- In favor of what persons, 119.
- Not in favor of what persons, 120.
- Presumption of, rebuttable by parol evidence, 120.

AGENT—

- Notice to, effect of, on principal, 38.
- Cannot purchase estate of the principal, nor derive benefit from the estate of, 145.
- Good faith and full disclosure necessary between principal and, 407.
- Cannot make secret profit out of his agency, 407.

ANTE-NUPTIAL AGREEMENT—

- Post-nuptial settlement in pursuance of, 87.

ANTICIPATION, RESTRAINT ON.—See SEPARATE ESTATE.

APPOINTMENT.—See POWERS; FRAUD IN EQUITY.

APPLICATION OF PURCHASE-MONEY.—See PURCHASE-MONEY.

APPROPRIATION.—See EQUITABLE ASSIGNMENT.

APPROPRIATION OF PAYMENTS—

- What it is, 448.
- Debtor has first right to appropriate payment to which debt he chooses at time of payment, 448.
- If debtor omit, creditor may make appropriation, 449.
- If neither make appropriation, the law makes, 450

ARBITRATOR—

- Agreement to refer to, when enforced, 429.

ASSETS—

- Distinction between legal and equitable, 250.
- Refers to remedy of the creditor, 251.
- Importance of distinction between legal and equitable, formerly and at present, 252.
- Varieties of equitable, 252.
- Charge of debts distinguished from a trust, 253.
- In a trust for payment of debts lapse of time no bar, 253.
- What amounts to a charge of debts, 254.
- General direction by testator for payment of his debts, 254.
- Order of liability of different properties of testator, 257.
- The general personal estate, primary liability of, 258.
- Lands expressly devised for payment of debts, equitable, 260.
- Realty descended, legal 260.
- Realty devised charged with debts, equitable assets, 260.
- General pecuniary legacies, 261.
- Specific legacies and devises *pro rata*, 261.
- Property over which testator has exercised a general power of appointment, 262.
- Paraphernalia, 263.
- Reasons why personalty is primarily liable, 263.
- See MARSHALLING OF ASSETS; MORTGAGES.

ASSIGNEE—

- Of chose in action, notice by, 93.
- Tantamount to possession, 94.
- Takes chose in action subject to equities, 94.
- Exception as to negotiable instruments, and as to debentures payable to bearer, 95.
- Assignments contrary to public policy, 96.

**ASSIGNEE—Continued.**

Partaking of nature of champerty and maintenance, 96.

**ASSIGNMENT, EQUITABLE.—See EQUITABLE ASSIGNMENT.**

**ATTORNEY, POWER OF—**

Is not an equitable assignment or appropriation, 92.

**SEE EQUITABLE ASSIGNMENT.**

**AUCTIONEER—**

Fiduciary position of, 407.

**AUCTIONS—**

Agreement not to bid at auction, 412.

Puffing at auction, when permitted, 412.

**AUXILIARY JURISDICTION—**

In aid of defects of common law system, 14.

Where plaintiff having legal estate applies to auxiliary jurisdiction, defence of valuable consideration without notice is good, 28.

**BENEFICIARIES—**

Trustees cannot take as, 122.

Devise with a charge, devisees take as, 122.

**BILL OF EXCHANGE—**

Acceptance of, in part payment of purchase-money no waiver of lien, unless taken in *substitution* of lien, 128.

Remedy in case of lost, 360.

Remedy in case of destroyed, 361.

**BILL OF PEACE—**

How distinguished from Bill *quia timet*, 512.

**BILL, QUIA TIMET—**

In order to prevent anticipated wrong, 512.

**BILL TO ESTABLISH WILL—**

Court of Probate had jurisdiction over wills of personalty, 522.

Devisee might come into equity to establish a will against heir-at-law, 523.

Even though heir-at-law had not brought ejectment, 523.

Devisee might establish a will against all setting up an adverse right  
524.

Heir-at-law could come into equity only by consent, 524.

**BILL TO PERPETUATE TESTIMONY.—SEE TESTIMONY, BILL TO PERPETUATE.**

**BILL TO TAKE EVIDENCE DE BENE ESSE.—See TESTIMONY, BILL TO PERPETUATE.**

**BONA VACANTIA—**

When Crown takes personalty as, 124.

**BOND—**

Acceptance of, for purchase-money, not a waiver of lien on estate, 128.

Unless taken in *substitution* of lien, 128.

Remedy in case of lost, 357.

**BREACH OF TRUST.—See TRUSTEES.**

**CANCELLING AND DELIVERY UP OF DOCUMENTS—**

When instrument ordered to be delivered up, 516.

Granting such a decree a matter not of right, but of discretion, 516.

Voluntary deed or agreement, not ordinarily relieved against, 517.

Relief where plaintiff has good defence at equity, though not at law, 517,

Voidable instruments, 517.

Void instruments, 519.

**CARE AND DILIGENCE—**

Required of trustees and executors, amount of, 142.

CAVEAT EMPTOR. See FRAUD IN EQUITY.

CESTUI QUE TRUST.—See TRUST; TRUSTEE.

**CHAMPERTY—**

Assignments affected by, 96.

Purchase *pendente lite*, when permitted and when not, 97.

**CHARITIES—**

Charities are favored by law:—

A testator's general charitable intention will be carried into effect by the court, 109.

Provided object be, in fact, charitable, 110.

Doctrine of *cy-pres* applied, 111.

Defects in conveyance to, supplied, 112.

No resulting trust of surplus to representatives of donor, where a general charitable intention, 112.

Even where excess of income subsequently arises, 112.

But a resulting trust where original income not all given, 112.

Charities are treated on a level with individuals in respects following;—

Want of executor or trustee supplied, 113.

Lapse of time a bar, 113.

Charities less favored than individuals in respect that;—

Assets not marshalled in favor of charities, 114.

Unless by express direction of testator, 115.

**CHATELS PERSONAL—**

Statute of Uses not applicable to, 59.

Not within 27 Eliz., c. 4, 85.

Husband's right in wife's, 816.

**CHATELS REAL—**

Within 27 Eliz., c. 4, 85.

Within Statute of Frauds, 59.

Husband's right in wife's, 817.

**CHOSE IN ACTION—**

Not generally assignable at law, 91.

When assignable in equity, 91.

Assignee of, takes subject to equities, 94; with certain exceptions, 95.

Husband's right in wife's, 87.

**CIVIL LAW—**

Traces of its influences on English Equity, 9.

**COMPROMISES—**

Requisites to validity of, 370. See MISTAKE.

CONCEALMENT.—See FRAUD IN EQUITY.

**CONCURRENT JURISDICTION—**

Where equity has, with common law, 354.

**CONSIDERATION—**

Trust may arise without, 70. See VOLUNTARY TRUSTS.

Classification of considerations, 86.

Marriage a valuable, under 27 Eliz., c. 4, if *bona fide*, 86.

Who within scope of marriage consideration, 88.

CONSTRUCTIVE FRAUD.—See FRAUD IN EQUITY.

CONSTRUCTIVE NOTICE.—See NOTICE.

**CONSTRUCTIVE TRUSTS—**

Definition of, and distinction from express and implied trusts, 127.

Vendor's lien for unpaid purchase-money, 127.

Lien not lost by taking a collateral security *per se*, 128.

As a bond, bill, or promissory note, 128.

CONSTRUCTIVE TRUSTS—Continued.

- Unless bond, etc., *substitutive* of the lien, 128.
- Against whom lien may be enforced, 130.
- Against whom lien may not be enforced, 131.
- Vendor may lose his lien by negligence, 131.
- Vendee's lien for prematurely paid purchase-money, 133.
- Renewal of lease by trustee in his own name, 133.
- What improvements on land of another allowed for, 134.
- He who seeks equity must do equity, 134.
- Improvements by tenant for life, when allowed for, 135.
- Heir of mortgagee trustee for personal representatives, 136.
- Mode of constructing trusts, explained and illustrated, 136.

CONTRACT.—See SPECIFIC PERFORMANCE; INJUNCTION.

CONVERSION—

- Equitable, principles of, 169.
- Of money into land, or land into money, 169.
- Must be imperative, either (a.) express or (b.) implied, as where limitations are adapted only to land, 170, 171.
- Time from which conversion takes place, 171.
- Where purpose subsequently fails, property is reconverted, 178.
- Effects of, 178.
- Results of total or partial failure of the objects, 178.
- Under settlements, 188.
- Distinction between partial failure under a will and under a settlement, 188.
- See also RECONVERSION.

COPYRIGHT—

- Injunction in cases of, 497.
- None in irreligious or immoral publication, 498.
- What is an infringement, 498.
- Copyright in maps, 499.
- In lectures, 500.
- Publication of letters, when restrained, 500.

CREDITORS—

- Trust in favor of, revocable, as a general rule, 89.
- Rule in United States, 90.
- Amounts to mere direction to trustees as to mode of disposition, 89.
- Where creditor a party to deed, 90.
- Who not entitled to benefit of trust, 90.

CREDITORS, FRAUD UPON—

- Under 13 Eliz., c. 5, 81.
- At common law. See FRAUD IN EQUITY.

CY-PRES—See CHARITIES.

DAMAGES.—See INJUNCTION.

DE BENE ESSE.—See TESTIMONY, BILL TO PERPETUATE.

DELAY.—See NEGLIGENCE.

DELAY DEFEATS EQUITY.—See VIGILANTIBUS, &c.

DELEGATION—

- By trustee of his office, 141.
- Where there is a moral necessity, 141.

DELIVERY—

- Essential to *donatio mortis causa*, 161.

DELIVERY-UP, SPECIFIC, OF CHATELS—

- Contracts as to rare and beautiful articles of *virtu*, 458.
- Of picture to artist who had painted it, no price having been named, 458.
- Heirlooms and chattels of peculiar value, 458.
- Damages no compensation in such a case, 458.

DELIVERY UP OF DOCUMENTS.—See CANCELLING AND DELIVERY UP OF DOCUMENTS.

DEMONSTRATIVE LEGACY.—See LEGACIES.

DEPOSIT, MORTGAGES BY.—See MORTGAGE, EQUITABLE.

DIRECTORS cannot derive personal benefit in their character as such, 145.

#### DISCOVERY—

Every bill in equity may be a bill of, 507.

But a bill of, strictly so called, seeks for discovery in aid of proceedings in another court, 506.

In the United States, 507.

Generally an action must have been already commenced, 508.

Origin of equitable jurisdiction, 508.

Defences to bill of, 508.

DISCRETIONS AND DUTIES.—See TRUSTEES.

#### DONATIO MORTIS CAUSA—

Must be in expectation of death, 158.

Revoked by recovery or resumption, 158.

Delivery essential to, 159.

What is a sufficient delivery—161.

What may be given as *donationes mortis causa*, and what not, 164.

How it differs from a legacy, 164.

How it differs from a gift *inter vivos*, 164.

#### DOWER—

Election with reference to, 212.

What is inconsistent with widow's rights to, 213.

#### DRUNKENNESS—

When a reason for setting aside a contract, 394.

DURESS.—See FRAUD IN EQUITY.

DUTIES AND DISCRETIONS.—See TRUSTEES.

#### ELECTION—

Arises from inconsistent alternative gifts, 201.

Illustrations of such gifts, 201.

Foundation and characteristic effect of the equitable doctrine, 203.

Under instrument, 203.

Against instrument, 204.

Principle of compensation, and not forfeiture, governs the doctrine. 204.

Cases where testator makes two bequests of his own property, no case of election proper, 205.

There must be fund from which compensation can be made *i. e.*, some property of donor's own, 205.

Election under powers, 207.

Where testator affects to dispose of his own by an ineffectual instrument, 210.

What is inconsistent with widow's right to dower, 212.

Testator is presumed to have given his own where he has a limited interest 214.

Evidence *dehors* the instrument not admissible to make out a case of election, 216.

Persons under disabilities, mode of election by,—217.

What is deemed an election by conduct, 218.

Length of time raises presumption of, 219.

EQUALITY IS EQUITY.—See JOINT-TENANCIES.

EQUITABLE ASSETS.—See ASSETS.



**EQUITABLE ASSIGNMENT—**

- General rule of old common law, that *choses in action* is not assignable, 90.
- General rule infringed upon by equity, 91.
- Order given by debtor to creditor on a third person a good, equitable assignment, i. e., appropriation, 91.
- Notice to legal holder by assignee is necessary to perfect his title as against third person, 93.
- Assignee of *choses in action* takes subject to equities, 94.
- Except in the case of negotiable securities and of debentures payable to bearer, 95.
- Assignments contrary to public policy, as of salary of public officer, 96.
- Assignments affected by champerty and maintenance, 96.
- Purchase of an interest *pendente lite* when permitted, and when not, 97.

**EQUITABLE JURISDICTION—**

- Courts bound by settled rules and precedents, 4.
- Origin of jurisdiction of Court of Chancery, 6.
- Reasons of separation between Civil Law and English, 7.
- New defences unprovided for, 9.
- Ordinance of 22 Edw. III. as to matters "of grace," 10.
- Exclusive jurisdiction, 13.
- Concurrent jurisdiction, 13.
- Auxiliary jurisdiction, 14.

**EQUITABLE MORTGAGE.—See MORTGAGE, EQUITABLE.**

**EQUITABLE LIEN—**

- Vendor's lien for unpaid purchase-money, 127.
- Vendee's lien for prematurely paid purchase-money, 133.
- See CONSTRUCTIVE TRUSTS.

**EQUITY—**

- Various senses in which equity is used, 1.
- Common law as much founded on natural justice and good conscience as, 2.
- Definition of, by reference to its extent, and not its content, 2.
- The old definitions of equity stated and explained, 3.
- Modern equity, character of, 4.
- Courts of, bound by settled rules and precedents, 5.
- Modes of interpreting laws same in, as at common law, 5.
- Reasons of separation between common law and equity, 7.
- Common law became a *jus strictum* too early, 7.
- Roman law was deprived of authority in the courts, 8.
- System of common law procedure more defective even than common law principles, 8.
- Failure of remedy attempted by statute in *consimili casu*, 10.
- Modern fusion of equity and law 12.
- Equity is a science and rests on maxims, 15. See MAXIMS OF EQUITY.

**EQUITY OF REDEMPTION.—See MORTGAGE.**

**EQUITY FOLLOWS THE LAW—**

- In concurrent jurisdiction, absolutely, 17.
- In exclusive jurisdiction, discretionarily, 19.

**EQUITY WILL NOT SUFFER A WRONG, &c.—See NO WRONG WITHOUT A REMEDY IN EQUITY.**

**EQUITY, WHO SEEKS, MUST DO—**

- Illustrations of maxim, 41.

**EQUITY LOOKS TO CLEAN HANDS—**

- Illustrations of maxim, 42.

**EQUITY LOOKS TO THE INTENT RATHER THAN THE FORM—**

- Illustrations of the maxim, 45.

**EQUITY, DELAY DEFEATS, 43.**

**EQUITY, EQUALITY IS, 43.**

**EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO HAVE BEEN DONE**  
Illustrations of the maxim, 45.

**EQUITY IMPUTES AN INTENTION TO FULFIL AN OBLIGATION—**  
Illustrations of the maxim, 46.

**EQUITY TO A SETTLEMENT—**

An equitable modification of the husband's legal rights, 340.

Marriage a gift of wife's personal property to husband subject to his reduction of it into possession, 340.

Her equity does not depend on a right of property in her, 340.

But arises from the maxim, "He who seeks equity must do equity," 341.

The court imposes conditions on the husband coming as plaintiff, 341.

Wife permitted to assert her right as plaintiff, 342.

**EVIDENCE.—See EXTRINSIC EVIDENCE.**

**EVIDENCE DE BENE ESSE.—See TESTIMONY, BILL TO PERPETUATE.**

**EXECUTOR—**

Has lien on trust fund for expenses of renewal of lease,

Care and diligence required of, 142.

No remuneration allowed to, 143.

Rule different in the United States, 143.

May not make profit out of estate, 144.

Answerable for own acts only, 149.

Difference between trustee and, 150.

Joining in receipts *prima facie* liable, 150.

Must not allow estate of testator to remain out on personal security, 153.

And must forthwith invest same, 152.

Investments by, on authorized securities, 152.

Retainer by, 264.

Not charged for accidental loss or failure of assets, 364.

Under such circumstances creditor's action stayed, 364.

See also TRUSTEES.

**EXECUTED AND EXECUTORY TRUSTS, 60-67,**

Distinction between *in se*, 60, 61.

As to trusts executed, equity follows law, 61.

As to trusts executory, equity may or may not follow law, 61, 67.

Distinction between executory trusts in marriage articles and in wills, 62, 63.

Under marriage articles, court decrees a settlement in conformity with presumed intention, 63, 64.

In wills, court seeks for the expressed intention, 64.

Trusts executory in wills construed strictly in absence of expressed intention to the contrary, 65.

Trusts executory construed according to contrary intention if that is expressed, 65, 67.

What expressions show a contrary intention, 63.

**EX NUDO FACTO NON ORITUR ACTIO—**

Application of maxim to voluntary trusts, 69.

See VOLUNTARY TRUSTS.

**EXPRESS TRUSTS—**

Express private trusts, 61.

Executed and executory trusts, 62.

**EXPRESS TRUSTS—Continued.**

Voluntary trusts and trusts for value, 69.

Fraudulent trusts, 81.

Trusts in favor of creditors, 82, 89.]

Equitable assignments, 90.

Secret trusts, 104.

Powers in the nature of trusts, 106.

Liability of a purchaser to see to application of his purchase-money, 108.

Express public [*i. e.* charitable] trusts, 109. See **CHARITIES**.

**EXTRINSIC EVIDENCE—**

When and what admissible to disprove resulting trust, 120.

When and what admissible to rebut or to affirm advancement, 120.

When admissible in case of secret trusts, 104.

Inadmissible to raise question of election on will, 216.

When and where not admitted in cases of satisfaction, 247.

**FAMILY COMPROMISES.—See COMPROMISES; MISTAKE.****FEME COVERT.—See MARRIED WOMEN.****FOLLOWING TRUST FUNDS.—See TRUSTEES.****FORFEITURES, PENALTIES AND—**

Equitable jurisdiction in, maxim underlying, 45.

Doctrine as to, 309.

If compensation can be made, equity relieves, 309.

Party cannot avoid the contract by paying penalty, 310.

Where covenantor may do either of two things, paying higher for one alternative than the other, it is not a penalty, 310.

Rules as to distinction between penalty and liquidated damages, 311.

Smaller sum secured by larger, the larger a penalty, 311.

Covenant to do several things, and one sum for breach of any or all, a penalty, 312.

Where amount of injury cannot be measured, not a penalty, 313.

Mere use of term "penalty" or "liquidated damages," not conclusive, 313.

Forfeitures governed by same principles as penalties, 314.

Excepting as between landlord and tenant, 314.

**FRAUD IN EQUITY—****I. ACTUAL—**

In what cases equity gives relief, 382.

Equity acts upon weaker evidence than law in inferring, 383.

Actual fraud of two kinds.

**1. Arising from the conduct of parties, irrespective of the position of the injured party, 384.****(a.) MISREPRESENTATION, or *suggestio falsi*, 384.**

Misrepresentation by directors of companies, 386.

**(b.) CONCEALMENT, or *suppressio veri*, 388.**

Facts must be such as the party was under an obligation to disclose, 388.

As to intrinsic defect in personal chattels, *caveat emptor*, 389.

Silence sometimes tantamount to direct affirmation, 389.

Insured must communicate all material facts within his knowledge, 389.

Inadequacy of consideration will not *per se* avoid a contract, 390.

Inadequacy may be evidence of fraud, 391.

Equity will not aid where parties cannot be placed *in statu quo*, 392.

Fraudulent contracts usually valid until avoided, 392.

**2. Cases of fraud arising from the condition of injured parties, 393.**

Gifts and legacies on condition against marrying without consent, not defeated by fraudulent refusal, 393.

**FRAUD IN EQUITY—Continued.**

- Persons *non compos mentis*, 398.
- Drunkenness,—394.
- Imbecile persons, 395.
- Persons of competent understanding under undue influence, 395.
- Duress, or extreme necessity, 395.
- Infants, 396.
- Feme covert* no capacity to contract at law, 397.

**II. CONSTRUCTIVE—**

Three Classes, 398.

(1.) Constructive frauds as contrary to policy of the law, 399.

Marriage brokerage contracts, 399.

Rewards given for influencing another person in making a will, 399.

Contracts in general restraint of marriage, void, 400.

“ “ “ of trade, “ 400.

Agreements founded on violation of public confidence, 400.

As buying and selling offices, 401.

Neither party to an illegal agreement is aided, as a general rule, 401.

Except on grounds of public policy, 401.

(2.) Constructive frauds arising from a fiduciary relation, 401.

Gifts from child to parent void if not in perfect good faith, 403.

Guardian and ward cannot deal with each other during continuance of relation, 402.

Medical advisers, 403.

Ministers of religion, 403.

Solicitor and client, 403.

Trustee and *cestui que trust*, 405.

Purchase by trustee from *cestui que trust* cannot be upheld, 405.

Gift to trustee treated on same principles as one between guardian and ward 406.

Principal and agent, 407.

Counsel, 407.

Auctioneers, 407.

Debtor, creditor, and sureties, 407.

(3.) Constructive frauds, as being unconscientious or injurious to the rights of third parties, 408.

Statute of Frauds cannot be set up as a protection to fraud, 408.

Common Sailors, 408.

Bargains with heirs and expectants, 408.

*Post obits*, 410.

Tradesmen selling goods at extravagant prices, 410.

Party injured may acquiesce after pressure of necessity has ceased, 410.

One who knowingly produces false impression to mislead third person, 411.

A man who has title to property standing by, and letting another purchase or deal with it, is bound, 411.

Agreements at auctions not to bid against one another, 412.

Employment of puffer at auction, 412.

Fraud upon consenting creditors to a composition deed, 412.

A power must be exercised *bona fide* for the end designed, 413.

Doctrine of illusory appointments, 413.

A man representing a certain state of facts as an inducement to a contract cannot derogate from it by his own act, 414.

**FRAUD ON MARITAL RIGHTS—**

Wife must not commit a fraud on marital right, 342.

Conveyance by wife, *prima facie* good, 343.

If during treaty of marriage she alienes without husband's knowledge property to which she has represented herself entitled, it is fraudulent, 343.

If he has seduced her before marriage, her conveyance is good as against him, 345.

**FRAUDS, STATUTE OF—**

- Trusts, required to be in writing by, 58.
- Exception from, 57.
- Interests within, 59.
- Resulting trusts not within, 59.
- Specific performance of parol agreement notwithstanding. See SPECIFIC PERFORMANCE.
- Parol evidence, when admissible under. See EXTRINSIC EVIDENCE.

**FRAUDULENT TRUSTS AND GIFTS—**

- (1.) Under 13 Eliz., c. 5, 81.
  - Settlement to be both for good consideration and *bona fide*, 82.
  - Settlement, voluntarily, not necessarily fraudulent, 82.
  - Settlor being indebted does not invalidate conveyance, 82.
- Settlor being embarrassed at time, or becoming embarrassed in consequence, invalidates conveyance, 82.
- (2.) Under 27 Eliz., c. 4, 84.
  - Voluntary settlement void against subsequent purchaser, 84.
  - Voluntary settlement void against subsequent mortgagee, 84.
  - Subsequent purchase must be from very settlor, 85.
  - Chattels, personal, not within the statute, 85.
  - Considerations meritorious and valuable distinguished, 86.
  - Marriage to follow is a valuable consideration, if *bona fide*, 86.
  - Settlement in pursuance of pre-nuptial agreement is not voluntary or fraudulent, 87.

**FUSION OF LAW AND EQUITY—**

- In America, 12.

**GENERAL LEGACIES—See LEGACIES.**

**GIFTS, INTER VIVOS—**

- If ineffectual, not supported as *donatio mortis causa*, 160.
- How they differ from a *donatio mortis causa*, 160.

**GUARDIANS—**

- Cannot derive personal benefit from the estate of their wards, 145.
- Who may be, and their duties, 346.
- Gift from infant to, how far valid, 402.
- Quasi-guardians, as medical advisers, ministers, fraud by, 403. See FRAUD IN EQUITY.

**HUSBAND AND WIFE—See MARRIED WOMAN.**

**IGNORANTIA LEGIS NEMINEM EXCUSAT.—See MISTAKE.**

**IMPERFECT CONVEYANCE—**

- Evidence of a contract, 70.

**IMPLIED AND RESULTING TRUSTS—**

- (1.) Purchase in the name of stranger results to the purchaser, 116.
  - Applicable to realty as well as personalty, 117.
  - Parol evidence admissible to show actual purchaser, 117.
  - But not so as to defeat policy of law, 118.
  - Resulting trust may be rebutted by evidence, 118.
  - Advancement, presumption of, 118. See ADVANCEMENT.
- (2.) Resulting trust of unexhausted residue, 122.
  - Devisee charged* distinguished from *devise on trust*, 122.
  - Who takes, where settlor dies without representatives, 123.

**IMPROVEMENTS—**

- By life-tenant, when allowed as against the inheritance, 134.

**IMPUTATION OF PAYMENTS.—See APPROPRIATION OF PAYMENTS.**

## IN CONSIMILI CASU, WRIT OF—

New cases unprovided for by existing writs gave rise to, 10.

## INDEMNITY OF TRUSTEES.—See TRUSTEES.

## INFANTS—

Guardians of, who may be, 345.

Jurisdiction from crown as *parens patriæ*, 347.

Delegated to Chancery, 348.

Becomes ward of court when bill is filed relative to his estate, 348.

Infant must have property that court may exercise its jurisdiction, 348.

Jurisdiction over guardians, 348.

When father loses his guardianship, 349.

## INJUNCTION—

Definition of, 481.

Jurisdiction arose from want of adequate remedy at law, 481.

Injunctions to stay proceedings, 482.

Equity may even restrain proceedings in a foreign court, if parties within jurisdiction, 483.

Relief where the remedy at law would be complete if proofs could be had, 484.

Equity would restrain proceedings on an instrument obtained by fraud or undue influence, 484.

Where loss by executor or administrator of assets without his default, 485.

Equitable title protected against bare legal title, 485.

Injunction on creditor's bill for administration, 486.

Party cannot bring several suits for one and the same purpose, 486.

Except in case of mortgages, 486.

Where equity would not stay proceedings at law, 487.

In criminal matters, or matters not purely civil, 487.

Where ground of defence equally available at law, 487.

Injunctions against wrongful acts of a special nature, two classes of—488.

Injunctions in cases of contract, 488.

Injunctions in special cases independent of contract, *i. e.*, against torts, 492.

Jurisdiction in case of waste, 493.

Nuisances, 495.

Public nuisances abated indictment, but sometimes also by injunction on information, 495.

Where it causes special damage, 496.

Private nuisance, 496.

Court will not interfere if it can be compensated by damages, 496.

Copyright, patents, and trade marks, 497.

No copyright in irreligious, immoral, or libellous works, 498.

What is an infringement of copyright, 498.

Piracy of maps, calendars, tables, &c., 499.

Copyright of lectures, 500.

Copyright in letters on literary subjects or private matters, 500.

Cases of trade-marks, injunction does not depend on property, but because equity will not permit fraud, 502.

A man cannot be restrained from using his own name as vendor of an article if not guilty of fraud, 502.

## IN LOCO PARENTIS—

What puts one in, 239.

## IN PERSONAM—

Equity acts, 47.

## INSURANCE—

Policies of life and marine, assignable, 76.

**INSURANCE—Continued.**

- Forfeiture on breach of covenant to insure, relieved against, 314.
- Contract of, void, unless complete disclosure, 417.

**INTEREST REIPUBLICÆ UT SIT FINIS LITIIUM.—** See **BILL OF PEACE.****INTERPLEADER—**

- Where two or more persons claim the same thing from a third person, 505.
- At common law only in cases of joint-bailment, 506.
- In the United States, 506.

**JOINT-TENANCIES—**

- Equity does not favor, 124.
- None where purchase-money advanced in unequal shares, 125.
- None where mortgage money advanced in equal or unequal shares, 125.
- Equity discourages survivorship, and even law does so, in commercial purchases, 125.
- Full survivorship, where lands devised in joint-tenancy, 126.
- Unless such lands thrown into partnership assets, 126.
- Lien for improvements on property held in, 336.
- For costs of renewing lease by joint tenant, 336.

**JURISDICTION IN EQUITY—**

- Nature and character of, 1.
- Origin of, 6.
- Modern fusion of, with law, 12.
- Classification of, 13—14.

**JUS ACCRESCENDI—**

- Not applicable to mercantile transactions, 126.

**LACHES.—** See **ACQUIESCENCE.****LAND.—** See **ASSETS; CONVERSION.****LAW, EQUITY FOLLOWS ANALOGY OF.—** See **EQUITY FOLLOWS LAW.****LAW PREVAILS, WHERE EQUITIES EQUAL—**

- Illustration of the maxim, 23.

**LEGACIES—**

- Suits for, only in equity, unless executors assent, 165.
- Equity jurisdiction, when exclusive and concurrent, 165.
- Jurisdiction of as affected by Courts of Probate.
- Distinction between general, specific and demonstrative, 167.
- See also **SATISFACTION; PERFORMANCE.**

**LEGAL ASSETS.—** See **ASSETS.****LIABILITY OF PURCHASER.—** See **PURCHASE-MONEY.****LIEN—**

- Varieties of, 304.
- Foundation of equitable jurisdiction regarding, 304.
- Distinction among liens, 305.
- Vendors, for unpaid purchase-money, 127.
- Vendee's, for prematurely paid purchase-money, 133.
- Trustee has, for expenses of renewing lease, 135.
- Person paying premiums on policy has, 135.
- Particular, distinguished from general, 305.
- On lands, distinguished from lien on goods, 305.
- On papers, distinguished from lien on funds, 305.
- Solicitor has, on deeds and papers of his client, 305.
- And on fund realized in a suit, 306.
- Banker's lien, 307.
- Quasi-liens, charge in the nature of a trust, 307.
- Vendor's, for money advanced for improvements, 307.
- None, where two purchase and one pays the purchase-money, 307.
- Joint-tenants, for costs of renewing lease, 307.

**LIMITATION STATUTES OF—**

- In what sense equity bound by, 20.
- Charities barred by, like individuals, 113.
- Time runs in favor of constructive trustees, 146.
- As between trustees and *cestui que trust*, no bar, 146.

**LUNATICS—**

- Unsoundness of mind is no ground of jurisdiction in equity, 351.
- Jurisdiction was in Exchequer on inquisition, 351.
- Exchequer jurisdiction in lunacy transferred to Lord Chancellor, 352.
- See also FRAUD IN EQUITY.

**MAINTENANCE.—See CHAMPERTY.****MARITAL RIGHT.—See FRAUD ON MARITAL RIGHT; MARRIED WOMEN.****MARRIAGE—**

- Gifts of legacies on condition of, with consent of parents or guardians, 393.
- Marriage brokerage contracts void, 399.
- Contracts in general restraint of, 400.

**MARRIAGE ARTICLES—**

- Executory trusts in, 64.
- Construed so as to make strict settlement, 64.

**MARRIAGE CONSIDERATION—**

- Under 27 Eliz., c. 4, 86.
- Post-nuptial settlement in pursuance of anti-nuptial parol agreement, *quære* valid or not, 87.
- Who within scope of, 88.

**MARRIAGE SETTLEMENTS.—See SETTLEMENTS.****MARRIED WOMAN—**

- Interference of equity in creating separate estate. See SEPARATE ESTATE.
- Interference of equity in decreeing wife an equity to a settlement. See EQUITY TO A SETTLEMENT.
- See also FRAUD ON MARITAL RIGHTS; PARAPHERNALIA; PIN-MONEY; SURVIVORSHIP, WIFE'S RIGHT OF.

**MARSHALLING OF ASSETS—**

- Principle of, explained, 265.
- As between creditors, simple contract creditors permitted to stand in the place of specialty creditors, as against realty, 266.
- As between beneficiaries entitled, principle of, how derived from order of liability of divers properties, 269.
- None in favor of charities, 274.

**MARSHALLING OF SECURITIES—**

- General rules regarding, 268.
- As against sureties, 268.

**MAXIMS OF EQUITY—**

- Equity will not suffer a wrong without remedy, 16.
- Equity follows the law, 17.
- Where equities are equal, the first in time shall prevail, 20.
- Where there is equal equity, the law must prevail, 23.
- He who seeks equity must do equity, 41.
- He who comes into equity must come with clean hands, 42.
- Delay defeats equities, 43.
- Equality is equity, 43.
- Equity looks to the intent rather than the form, 45.
- Equity looks on that as done which ought to have been done, 45.
- Equity imputes an intention to fulfill obligations, 46.
- Equity acts in personam, 47.
- Equity acts specifically, 47.



**MISREPRESENTATION.**—See FRAUD IN EQUITY.

**MISTAKE—**

- Mistakes of law, 367.
- Ignorantia legis neminem excusat*, 367.
- An agreement under a mistake of law binding when, 367, 369.
- Surprise combined with a mistake of law remedied, 369.
- Family compromises upheld, 370.
- No relief where position of parties has been altered, 372.
- Unless there has been gross imposition, 372.
- Equity will not aid against a *bona fide* purchaser for value without notice 372.
- Mistake of fact as a general rule relieved against in equity, 372.
- Grounds generally for equitable relief, 374.
- Oral evidence admissible in case of accident, mistake, or fraud, 374.
- Rectification of mistakes in marriage settlements, 376.
- Mistakes in marriage contracts must be of both parties, 378.
- Instrument delivered up or cancelled under a mistake, 378.
- Defective execution of powers, 379.
- Mistakes in wills, 379.
- Mere misdescription of legatee will not defeat legacy, 379.
- Revocation of legacy on a mistake of facts, 380.
- Party claiming relief must have superior equity, 381.
- No relief between volunteers, 381.
- Or where defect is declared fatal by statute, 381.
- See ACCIDENT;

**MORTGAGE—**

- Definition of, 276.
- At common law, an estate upon condition. 276.
- Forfeiture at law on condition broken, 277.
- Interference of equity, 277.
- Equity operates on the conscience of the mortgagee, 277.
- Debtor cannot at time of loan preclude himself from his right to redeem, 278.
- Conveyance, with option to repurchase, 279.
- Circumstances distinguishing a, from a sale with right of repurchase, 279.
- Effects of this distinction, 280.
- Forms of mortgage now in disuse,—
  - Vivum vadium*, lender to pay himself from rents and profits, 281.
  - Mortuum vadium* creditor took rents and profits without account 281.
  - Welsh mortgage, mortgagor may redeem at any time, 281.
- Nature of equity of redemption, in modern mortgage, 282.
- Who may redeem, 283.
- Successive redemptions, order of, and general principle regarding, 284.
- Time to redeem, 285.
- Statutes of limitation, effect of, under old and under present law, 285.
- Liability of mortgagor in possession, 286.
- Mortgagor cannot make leases binding on mortgagee, 287.
- Mortgagee entitled to possession, 287.
- Mortgagee in possession of must account, 288.
- Cannot take a valid lease from mortgagor, 289.
- Cannot in equity make a binding lease, 290.
- The doctrine of tacking, 291.
- Foreclosure, 292.
- Sale by court. 292.
- Power of sale in mortgage deed, 293.
- Mortgagee may pursue all his remedies concurrently, 293.
- The equity of redemption follows the limitations of the original estate, 294.
- See M RTGAGE, EQUITABLE; MORTGAGES OF PERSONALTY; PLEDGE; TACKING; CONSOLIDATION; FRAUDULENT GIFTS.

**MORTGAGE, EQUITABLE—**

Of realty by deposit of title-deeds, 296.

Statute of Frauds requires contracts concerning lands to be in writing, 296.

Deposit of title-deeds being an agreement executed not within the Statute, 296.

Origin of the doctrine, 297.

When deposit of title-deeds covers further advances with interest, 297.

Legal mortgagee postponed to equitable mortgagee, if former guilty of fraud or gross negligence, 299.

Gross and wilful negligence tantamount to fraud, 299.

Absence of inquiry after deeds presumptive evidence of fraud, 299.

**MORTGAGES OF PERSONALTY—**

Differences between, and pledges, 301.

Differences between, and mortgages of realty, 301.

See PLEDGE.

**MORTUUM VADIUM.—See MORTGAGE.****NATURAL EQUITY—**

Cannot always be enforced in courts, 1, 2.

**NATURAL JUSTICE.—See NATURAL EQUITY.****NE EXEAT REGNO—**

Writ of, to prevent a person leaving the realm, 525.

**NEGLIGENCE—**

*Vigilantibus non dormientibus æquitas subvenit*, 43.

**NEGOTIABLE INSTRUMENT.—See BILL OF EXCHANGE.****NON-NEGOTIABLE INSTRUMENT.—See BILL OF EXCHANGE.****NO WRONG WITHOUT A REMEDY IN EQUITY—**

Meaning of this maxim, 16.

Its limits, 16.

**NOTICE—**

May be actual or constructive, 35.

Rule as to actual notice laid down in *Lloyd v. Banks*, 35.

Constructive notice of two kinds—

1. Where actual notice of a fact, which would have led to notice of other facts, 37.

2. Where inquiry purposely avoided to escape, 37.

Mere want of caution not constructive, 37.

Inquiry after title-deeds must be made, 38.

Notice to agent is notice to principal, 38.

Must have been given in the same transaction, 38.

**NOTICE, PURCHASER FOR VALUABLE CONSIDERATION WITHOUT—**

Defence of purchase for valuable consideration without notice, 24.

General remarks as to, 24.

When purchaser obtains legal estate at time of purchase, 24.

When purchaser gets in legal estate subsequently, 25.

When purchaser has best right to call for legal estate, 26.

Where plaintiff has a mere equity, the court will not interfere, 31.

**NUISANCE—**

Public, abated by indictment, and sometimes also by injunction on an information filed, 495.

Where it causes special damage, 496.

Injunction in case of private, 496.

Court will not interfere where damages a sufficient remedy, 496.

ONCE A MORTGAGE—

Always a mortgage, 278.

PARAPHERNALIA—

Nature of, 339.

PAROL EVIDENCE—

See EXTRINSIC EVIDENCE.

PARTITION—

Origin of equitable jurisdiction in, 504.

Writ of partition at law inadequate, 504.

Partition in the United States, 505.

PARTNERSHIP—

Equity has a practically exclusive jurisdiction, 427.

Enforces specific performance of agreement to enter into, for definite time where acts of part-performance, 427.

Injunction against omission of name of one of partners, 428.

Injunction against carrying on another business, 428.

Injunction against destruction of partnership property, or exclusion of partner, 428.

Courts of equity will not decree specific performance of articles of, where remedy at law is entirely adequate, 429.

Dissolution of partnership, modes of—429.

Partner making advantage out of partnership accountable to other partners, 433.

In equity, land forming an asset of, is money, 434.

Personal representatives takes, 434.

Creditors may, on decease of one partner, go against survivor, or against the estate of deceased, 434.

Separate creditors paid out of separate estate before partnership creditors, 435.

Partnership creditors paid out of partnership funds before separate creditors, 435.

Two firms having a common partner could not sue each other at law, but might in equity, 435.

At law one partner cannot sue his co-partner in a partnership transaction—he may in equity, 436.

PART-PERFORMANCE.—See SPECIFIC PERFORMANCE.

PATENTS.—See INJUNCTION.

PAYMENTS, APPROPRIATION OF.—See APPROPRIATION OF PAYMENTS.

PEACE, BILLS OF.—See BILL OF PEACE.

PENALTIES.—See FORFEITURES, PENALTIES AND.

PENDENTE LITE—

Purchase of interest, considered as maintenance or champerty, when, and when not, 97.

PENSIONS—

Assignment of, contrary to public policy, 96.

PERFORMANCE—

Equity imputes an intention to fulfil an obligation, 221.

Covenant to purchase land, and land is purchased, 221.

Right of *cestui que trust* to follow trust-fund, distinguished from performance, 225.

Covenant to pay or leave by will, and share under the Statutes of Distribution, 226.

When husband's death occurs *at or before* time when the obligation accrues, distributive share is a performance, 226.

**PERFORMANCE—Continued.**

Where husband's death occurs *after* obligation accrues, distributive share is not a performance, 228.

See SATISFACTION.

**PERPETUATE TESTIMONY, BILL TO.—See TESTIMONY, BILL TO PERPETUATE.****PERSONALTY—**

Parol declaration of trust of, binds, 76.

Where donor assigns his equitable interest in, 77.

An imperfect transfer of, not aided in favor of volunteer, 72.

An imperfect transfer of, aided in favor of a purchaser, 75.

**PIN-MONEY—**

Nature and object of, 339.

**PLEDGE—**

See MORTGAGE OF PERSONALTY.

**POLICY OF ASSURANCE—**

Assignable in equity, 74.

Assignable now at law also, 74.

Person paying premiums has lien on, 135.

**POST-NUPTIAL SETTLEMENT.—See SETTLEMENT.****POST-OBIT BOND.—See FRAUD IN EQUITY.****POWERS—**

Defective execution of, when aided, 361.

Execution of, must always be *bona fide* for the end designed, 413.

Secret agreement in fraud of object void, 413.

Doctrine of illusory appointments abolished, 413.

**POWERS IN NATURE OF TRUSTS—**

Court compels their execution, although wholly unexecuted, 106.

General intention in favor of a class carried out, if particular intention fail, 107.

**PRECATORY WORDS—**

No trust if there is a discretion, 100.

Recommendation must be imperative, 100.

The court leans against construing precatory words as imperative, 101.

**PRESUMPTION.—See ADVANCEMENT; IMPLIED TRUSTS; RESULTING TRUSTS; FRAUD IN EQUITY.****PRINCIPAL—**

Notice to agent is notice to, when, 38.

Mandate from, to agent not communicated to a third person, does not create a trust, 92.

Agent cannot make profit at expense of his, 145.

Good faith essential in dealings between, and agent, 407.

**PRINCIPLES OF EQUITY.—see EQUITY.****PROMISSORY NOTE.—See BILL OF EXCHANGE.****PUBLIC OFFICERS—**

Assignment of salaries of, 96.

**PUBLIC POLICY.—See EQUITABLE ASSIGNMENT; FRAUD IN EQUITY.****PURCHASE-MONEY—**

Liability of purchaser to see to application of, 108.

**PURCHASER—**

Defence of purchase for valuable consideration without notice, 24.

Where, obtains legal estate at time of purchase, 24.

**PURCHASER—Continued.**

- Where, gets in the legal estate subsequently, 25.
- Where, has best right to call for legal estate, 26.
- Where plaintiff, having legal estate, applies to auxiliary jurisdiction of equity, defence good, 28.
- 27 Eliz., c. 4, for protection of, 84.
- Voluntary settlement void as against subsequent, 84.
- Mortgagee is, but judgment creditor is not, 85.
- Bona fide*, under 27 Eliz., c. 4, who is, 86.
- Liability of, to see to application of purchase-money, 108.

**PURCHASES BY TRUSTEES.— TRUSTEE<sup>s</sup>.**

**QUIA TIMET.—See BILL QUIA TIMET.**

**QUI PRIOR EST TEMPORE POTIOR EST JURE.**

- Application of this maxim, and its limits, 20.
- True expression of the maxim, 20.

**RECONVERSION—**

- By act of parties, 190.
- Money into land, 191.
- Land into money, 192.
- How election is shown, 195.
- By operation of law, 197.

**RECTIFICATION OF CONTRACT—**

- Equity compels, on ground of mistake or fraud, 376.

**RELEASE—**

- By *cestui que trust* bars proceedings for breach of trust, 156.

**REMUNERATION.**

- None allowed to trustees, 143.
- Rule in United States, 143.

**RENEWAL OF LEASE—**

- Trustee renewing in his own name, a constructive trustee of renewed lease 145.

**RESULTING TRUST.—See IMPLIED AND RESULTING TRUSTS.**

**RESULTING USE.—See TRUST.**

**RETAINER BY EXECUTOR—**

- Right of, and limits thereto, 264.

**ROMAN LAW.—See CIVIL LAW.**

**RULE IN SHELLEY'S CASE.—See SHELLEY'S CASE. RULE IN.**

**SATISFACTION—**

- Distinguished from performance, 230.
- Of debts by legacies, 230.
- Of legacies by subsequent legacies, 234.
- Of legacy by portion, and of portion by legacy, 237.
- Presumption applies where donor has placed himself *in loco parentis* to donee, 239.
- What is putting oneself *in loco parentis*, 237.
- Leaning against presumption of double portions, 241.
- Where settlement comes first, persons taking under it are purchasers with right to elect between settlement and will, 244.
- Sum given by second instrument, if less, is *pro tanto*, 245.
- Legacy to a child, or to a wife, to whom testator is indebted, 246.
- Advancement by father to child to whom he is indebted, 245.
- Extrinsic evidence, admissibility of, 247.

**SECRET TRUSTS.—**

When enforced and when not, 104.

**SECURITIES, APPROPRIATION OF.—See APPROPRIATION OF SECURITIES.****SECURITIES, MARSHALLING OF.—See MARSHALLING OF SECURITIES.****SEPARATE ESTATE—**

Protective jurisdiction of Chancery in permitting married women to hold separate estate, 317.

*Feme covert* cannot at common law hold property apart from her husband, *secus* in equity, 317, 318.

Separate property before the "Married Women's Property Act," how created, 318.

Interposition of trustees unnecessary to existence, 319.

Husband a trustee for wife, 320.

Words sufficient to create a separate use, 320.

Wife's power of disposition over separate estate, 321.

Differences between separate property and general power of appointment in *feme covert*, 325.

Separate property only recognised in equity; her right to execute a power recognised at law and in equity, 325.

*Feme covert* cannot contract a debt to bind her appointed property; but her separate property liable, 326.

Though generally regarded as a *feme sole* in equity as to her separate estate, she could not originally bind that estate with debts in equity, 328.

Rule relaxed, 328.

Power and separate property confounded, 329.

Appointees under a power rank in order of time, 329.

Courts now hold that, to the same extent that she is regarded as *feme sole*, she may contract debts, 330.

Her verbal engagements now binding on her separate estate, 330.

General engagements bind the *corpus* of her personality, rents, and profits of her realty, 332.

Execution against, 332.

Creditor's suit for administration of, 333.

The origin of restraint on anticipation, 333.

*Feme covert* prohibited from taking the income before actually due, 333.

A man or *feme sole* cannot be so prohibited, 333.

Separate estate, with or without restraint, exists only during coverture, 334.

What words will and will not restrain alienation, 337.

Under Married Women's Property Act, 338.

Distinction between statutory and equitable, 338.

See also PIN-MONEY; PARAPHERNALIA.

**SET-OFF—**

At law, no set-off formerly in case of mutual unconnected debts, 443.

It demands connected, equity interposed, 444.

**SETTLEMENT—**

In consideration of marriage, 86.

The marriage is a valuable consideration, 86.

Who are within the scope of the marriage-consideration, 88.

**SETTLEMENT, WIFE'S EQUITY TO.—See EQUITY TO SETTLEMENT.****SETTLEMENT IN FRAUD OF MARITAL RIGHTS.—See FRAUD ON MARITAL RIGHTS.****SHELLEY'S CASE, RULE IN—**

When followed and when not in equity, 62.

**SOLICITORS—**

May stipulate to receive compensation, 144.

Lien on deeds and papers of client, 305.

## SOLICITORS—Continued.

On fund realized in a suit, 306.

*Gifts* from client to, void, 404.

May *purchase* from client, when, 404.

Rule as to gifts is absolute, 404.

Solicitor must take no more advantage than his fair professional remuneration, 404.

Agreement to pay gross sum for past business is valid, 405.

## SPECIFIC LEGACY.—See LEGACIES.

## SPECIFIC PERFORMANCE—

Breach of contract at common law renders liable to damages, 452.

In equity contract must in general be exactly performed, 452.

Cases in which equity will not decree, 452.

Distinction as to, of contracts relating to realty and personalty, 456.

Contracts concerning lands enforced, as legal remedy inadequate, 456.

Contracts as to personalty generally not enforced, because remedy at law is adequate, 456.

## (1.) Contracts respecting personal chattels, 456.

Not enforced, if damages at law are adequate compensation, 456.

Contract as to railway shares enforced, for such shares are limited in number, 456.

Contracts as to articles of *vertu*, 457.

Also of heirlooms and other chattels of peculiar value, 458.

Where any fiduciary relation exists, 458.

## (2.) Contracts respecting land, 459.

Almost universally enforced, since damages at law no remedy, 459.

Statute of Frauds broken in upon, where it is unconscientious to rely on it, 460.

Where agreement is confessed by defendant's answer, 460.

Where contract is partly performed by party seeking aid, 461.

Part performance, what it is, 462.

Post-nuptial written agreement in pursuance of ante-nuptial parol agreement, enforced, 465.

Representation for purpose of influencing another, which has that effect, will be enforced, 466.

Unsigned promise by husband to leave property by will not enforced, 467.

Where agreement concerning land is not put into writing by fraud of one of the parties, 468.

Representations of mere intention, or a promise upon honor, not enforced, 468.

Grounds of defence to suit for specific performance, 469.

Misrepresentation by plaintiff having reference to contract, 469.

Mistake rendering specific performance a hardship, 469.

Error of defendant although through his own carelessness, 470.

Misdescription a ground for defence, where it is of a substantial character 474.

Lapse of time when a defence, 477.

Equity will refuse aid unless a party comes with clean hands, 479.

No specific performance where there is great hardship in the contract, 479.

Or where it involves the doing of an unlawful act, or breach of trust, 479.

Contract is not established, 480.

Contract is already executed, 480.

See also INJUNCTION.

## STANDING BY.—See ACQUIESCENCE; FRAUD IN EQUITY.

## STATUTE OF FRAUDS—

Trusts, how created before that statute, 58.

Trusts, how created since that statute, 58.

Trusts, what excepted out of statute, 59.

## STATUTE OF FRAUDS—Continued.

Applies to freehold, copyhold, and leasehold lands, 59.

Applies not to pure personal estate, 59.

## STATUTES OF LIMITATION.—See LIMITATION, STATUTES OF.

## STATUTE OF USES—

Uses before the statute, express and implied, 51.

Uses since the statute, express and implied, 52.

Failure of, in accomplishing its object, 54.

Failure of, causes of, 54.

Failure of, restoration of equitable use (*i. e.*, trust) from, 56.

Applies to freehold lands, and only to passive uses therein, 56.

Applies not to freehold lands, active uses therein, 57.

## SURCHARGING AND FALSIFYING.—See ACCOUNT; TRUSTEES.

## SURETYSHIP—

Utmost good faith required between all parties, 415.

What concealment of facts by creditor releases surety, 415.

Rule as to concealment in insurance inapplicable to common suretyships, 417.

Rights of creditor against surety regulated by instrument of guaranty, 419.

Surety cannot compel creditor to proceed against debtor, 419.

Remedies available for surety 9.

At law, contribution was founded on contract, *secus*, in equity, 421.

Contribution against representatives of a deceased surety, 421.

Surety may limit his liability by express contract, 422.

Surety can only charge debtor for what he actually paid, 422.

Circumstances discharging the surety or co-surety, 422.

Marshalling of securities against sureties, 426.

## SURPRISE.—See MISTAKE; FRAUD IN EQUITY.

## SURVIVORSHIP.—See JOINT-TENANCIES.

## SURVIVORSHIP, WIFE'S RIGHT OF.—See EQUITY TO A SETTLEMENT.

## TACKING—

Principles of, 291.

## TESTATOR.—See WILLS.

## TESTIMONY, BILL TO PERPETUATE—

To preserve evidence in danger of being lost before a question can be litigated, 510.

Depositions are not published until after death of witness, 510.

Equity refuses, if matter can be at once litigated, 510.

Bill to take testimony *de bene esse*, how distinguished from, 511.

Grounds for taking evidence *de bene esse*, 511.

## TIME, A BAR.—See LIMITATION, STATUTE OF.

## TRADE-MARKS.—See INJUNCTION.

## TRUST—

Origin of, in grants to uses, 49.

Uses arose temp. Edw. III., 50.

Chancellor's jurisdiction over conscience enabled uses to be recognized in Chancery, 50.

Uses not recognized at common law, 51.

Until Statute of Uses, 27 Henry VIII., c. 10, made uses legal estates, 52.

Resulting use, consideration required to rebut, 54.

No use upon a use at law, 55.

Hence equitable jurisdiction, 55.

Trust distinguished from use for convenience only, 56.

In equitable estates, equity follows analogy of the law, 56.

Property to which Statute of Uses is inapplicable, 57.



**TRUST—Continued.**

Trusts might be created by parol until the Statute of Frauds, 58.  
 Statute of Frauds required writing to creation of certain trusts, 59.  
 Exceptions from statute, 59.  
 Under which the statute is applicable, 59.  
 Definition of, 59.  
 Classification of trusts, 60.

**TRUSTEES.**

Who may be, 138.  
 Equity never wants, 138.  
 In what sense servants, and in what sense controllers, of *cestui que trust*, 139.  
 May be compelled to perform any act of duty, 140.  
 Or restrained from abuse of his legal title, 140.  
 Cannot renounce after acceptance, 140.  
 Cannot delegate his office, 141.  
 Unless there is a moral necessity for it, 141.  
 Care and diligence required of, 141, 142.  
 No remuneration allowed to, 143.  
 May stipulate to receive compensation, 144.  
 Must not make any advantage out of his trust, 144.  
 Trading with trust estate, must account for profits, 144.  
 Cannot renew lease in own name, or purchase trust estate, 145.  
 Same principles apply to agents and persons in a fiduciary capacity, 145.  
 Exceptional cases in which fiduciary purchases hold good, 145.  
 Constructive, not liable to same extent as express, trustee, 145.  
 Time runs in favor of constructive, 146.  
 Constructive, may charge for time and trouble, 147.  
 Trustee liable for his co-trustee practically, 147.  
 Not liable for merely joining *pro forma* in receipts, 148.  
 Difference between co-trustees and co-executors, 150.  
 Indemnity clauses, utility of, 151.  
 Duties of trustees, 151.  
 Remedies of *cestui que trust*, in event of breach of trust, 154.  
 Breach of trust creates simple contract debt, 154.  
     Right of following the property into which the trust-fund has been converted, 155.  
 Interest payable on breach of trust, 156.  
 Acquiescence, effect of, 156.  
 Release and confirmation of trustees' acts, 156.  
 Settlements of accounts, 157.  
 Surcharging and falsifying, 157.  
     See also TRUST; TRUSTS, CREATION OF; IMPLIED AND RESULTING TRUSTS, &c.

**TRUSTS, CREATION OF—**

Three requisites to, 99.  
 (1.) Certainty of words, 100.  
 (2.) Certainty of subject-matter, 100.  
 (3.) Certainty of objects, *i. e.*, beneficiaries, 101.

**TRUSTS IN FAVOR OF CREDITORS—**

Revocable as a general rule, 89.  
 Rule in America, 89.

**TRUSTS IN THE GARB OF POWERS.—See POWERS IN THE NATURE OF TRUSTS.**

**UNSOUND MIND, PERSONS OF.—See LUNATICS.**

**USES.—See TRUST.**

**VADIUM.—See MORTGAGE.**

**VENDOR'S LIEN.—See LIEN.**

## VIGILANTIBUS NON DORMIENTIBUS ÆQUITAS SUBVENIT—

Illustrations of the maxim, 43.

## VIVUM VADIUM.—See MORTGAGE.

## VOLUNTARY SETTLEMENTS.

Notice of, does not affect subsequent purchaser, 84.

Under 13 Eliz., c. 5, must be both on good consideration and *bona fide*, 81.

Not necessarily fraudulent under 13 Eliz., c. 5, 82.

Settlor indebted at the time of, not necessarily an avoidance of, 82.

What amount of indebtedness will raise presumption of fraudulent intent, 82.

Under 27 Eliz., c. 4, voluntary settlement void as against subsequent purchaser, 84.

Chattels personal are not within the statute 27 Eliz., c. 4, 85.

A mortgagee is, a judgment creditor is not, a purchaser within the statute, 85.

*Bona fide* purchaser under 27 Eliz., c. 4., who is, 85.

Marriage a valuable consideration under 27 Eliz., c. 4, when and when not, 86.

Post-nuptial settlement in pursuance of ante-nuptial agreement, 87.

Post-nuptial settlement supported on slight consideration, 87.

Trust in favor of creditor, when and when not revocable, 89.

## VOLUNTARY TRUSTS—

Distinguished from trusts for value, 69.

General rules regarding validity of, 69.

Has relation of *cestui que trust* been constituted, 71.

Where donor is both legal and equitable owner, 71.

Where donor is only equitable owner, 76.

## VOLUNTARY TRUSTS AND TRUSTS FOR VALUE—

Distinguished, 69, 80.

## WAIVER OF LIEN.—See LIEN.

## WARD OF COURT.—See INFANT.

## WASTE—

Injunction in cases of, arose from inadequacy of common law remedy, 493.

In what cases equity interferes, 493.

## WELSH MORTGAGE.—See MORTGAGE.

## WHO SEEKS MUST DO EQUITY.—See HE WHO SEEKS EQUITY, &amp;c.

## WIFE.—See MARRIED WOMAN; ADVANCEMENT; ELECTION; SEPARATE ESTATE; EQUITY TO SETTLEMENT; FRAUD ON MARITAL RIGHTS; PIN-MONEY; PARAPHERNALIA, &amp;c.

## WILLS—

Executory trusts in. See EXECUTED AND EXECUTORY TRUSTS.

Trusts, creation of, in. See TRUSTS, CREATION OF; PRECATORY WORDS.

Admission of parol evidence in construction of. See EXTRINSIC EVIDENCE.

Conversion under. See CONVERSION.

When inconsistent or alternative bequests in. See ELECTION.

When cumulative or substitutionary bequests in. See SATISFACTION; LEGACIES.

Rewards for influencing testator in making a will fraudulent. See FRAUD IN EQUITY.

Mistakes in, when and what corrected in equity, 379.

## WRIT NE EXEAT REGNO. See NE EXEAT REGNO, WRIT OF.

## WRITS—

Procedure at common law by, cramped and inflexible, 10.

In *consimili casu*, statute giving, and failure thereof, 10.

## WRONG—

Equity will not suffer, without remedy, 16.





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